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OCTOBER 23, 2014

THE COURT: Good morning. Please be seated. What do we want to start with?

MR. CARTER: Your Honor, we have a motion.

THE COURT: Okay. We are on the record.

Mr. Carter.

MR. CARTER: Respectfully, Your Honor, on behalf of International Paper, we make our second motion for mistrial in as many days. Having reviewed last night the transcript of Dr. Bedient's testimony, it's clear that your October 4th ruling on Defendants' motion to exclude was violated by Dr. Bedient and Harris County. Beginning on Page 169, Line 22, Dr. Bedient identifies that he is using the Highway 90 gauge data for a purpose other than supporting his flood theory. He uses it to support his tidal action theory, which was not a permitted use under your ruling. The Court recognized this violation yesterday.

Since Dr. Pardue relies upon Dr. Bedient for the mechanisms for discharge, Harris County's violation of your order infects not only Dr. Bedient's testimony, but also Dr. Pardue's testimony; and as a result, a jury instruction regarding Dr. Bedient's testimony is insufficient to correct the County's

1 violation.

2 In addition, because the release theories
3 espoused by Dr. Bedient and relied upon by Dr. Pardue
4 are so intertwined, there is no possibility that a jury
5 instruction will ensure that International Paper's right
6 to a fair trial, which you attempted to ensure with your
7 October 4th ruling, can now be obtained.

8 As you know, the County recently tried
9 another matter involving similar penalty statutes
10 against the Melchers. That case also ended in a
11 mistrial. That mistrial was sought by the County, also
12 represented, as in this case, by Mr. Wotring and the
13 Connelly Baker firm.

14 The mistrial was sought by the County
15 based, in part, on defendants' expert having offered new
16 opinions during trial. In other words, Mr. Wotring was
17 sitting in my seat, that I sit in today, and I offer
18 this so we know the standard by which the County wishes
19 to be treated when it has been wronged.

20 Mr. Wotring, in open court in that
21 proceeding, when arguing for a mistrial, and I quote
22 from Volume 8, Page 214 of the trial transcript: "There
23 is no way of remedy by virtue from an instruction from
24 the Bench to strike this witness' reason."

25 We agree with this standard, and when

1 coupled with the grounds for our motion for mistrial
2 yesterday, the County's violation of this Court's
3 October 4 ruling requires a mistrial in this case. And
4 for that reason, we request that our motion be granted.

5 THE COURT: Thank you, Mr. Carter.

6 Mr. Wotring?

7 MR. WOTRING: Yes. In response, the
8 testimony from yesterday reflects what I said it would
9 reflect yesterday afternoon when this issue came up.

10 The first time the issue about the US
11 Geological data was addressed is not on Page 169, but,
12 in fact, on Page 165; and I asked Dr. Bedient about that
13 information. In fact, if you look at Page 165 of
14 yesterday's testimony, we start talking about the USGS
15 data; and my question at that point on Page 165 is:

16 "And did it help you formulate any opinions
17 in this case?"

18 His answer was, "It did."

19 The next question is: "And why don't you
20 describe how it did."

21 And here is his answer: "We were
22 basically, in that analysis, able to confirm levels of,
23 if you will, tide levels associated with particular days
24 when these photographs were taken. So from that, we
25 were able to say exactly whether or not this was at a

1 low-flow-type condition, these photographs, or was it a
2 flood event. And in almost all cases we were seeing
3 these at a low-flow condition. And, in particular, for
4 the one photograph 1976, it is at the -- one of the
5 lowest levels of the entire period of record all the way
6 through..."

7 That line of questions continues for 28
8 further questions before there is an objection by
9 counsel raising the issues that they have now raised.
10 So we don't believe that any objection was timely. It
11 was certainly not my intention to violate any of the
12 Court's orders, and I don't know that the Court's
13 rulings are in the record yet, but we didn't understand
14 the Court's rulings of October 4th to include the -- or
15 prohibit the use of the US Geological Survey data for
16 the questioning that I produced with Dr. Bedient
17 yesterday.

18 Had a timely objection been raised, we
19 could have precluded the very discussion we're having
20 now. In fact, prior to me putting Dr. Bedient on the
21 stand, we raised the issue about the scope of his
22 examination with counsel; and our understanding at that
23 time was if I was going into a prohibited area, they
24 would stand up and give some indication. That didn't
25 happen from Page 165 of the record on through Page 172,

1 where the issue was addressed for the first time.

2 I do think, to the extent the Court
3 believes we have violated the Court's previous rulings,
4 that issue can be addressed through an instruction for
5 the jury to disregard, to the extent that's necessary,
6 and we can move along with his examination.

7 I'll also note, as counsel has noted, this
8 is the second time that defendants have sought a
9 mistrial in this action, and it may even be the third
10 time, counting on -- depending on how you count their
11 inquiries about pretrial press coverage.

12 So we think that for whatever reason the
13 defendants have decided they don't want this case to
14 continue, they don't want it to go to a verdict, and
15 they are now attempting to lodge what we believe are
16 meritless objections with regard to obtaining a mistrial
17 in this matter.

18 If the Court wants, I can discuss at length
19 the proceedings in the previous trial last October
20 involving different defendants and the leading up to the
21 granting of the mistrial in that matter, if the Court
22 feels necessary.

23 Briefly stated, there were a number of
24 violations of explicit motions in limine which were
25 preceded by Court rulings and preceded by Court

1 instructions that led up to the mistrial in that
2 particular matter; and what has been cited from that
3 transcript is just but a tiny portion of the proceedings
4 leading up to the Court granting a mistrial upon Harris
5 County's request.

6 MR. REASONER: Your Honor, Waste Management
7 of Texas joins the motion. And I would just point out,
8 as the Court knows and Mr. Wotring knows better than I
9 do, 165, the quotation there is the proper use, what the
10 Court said was allowable, saying that this is at a low
11 level, it is not -- does not represent a flood or an
12 anomalous condition.

13 When you get to 169 and 70, twice, right in
14 there he goes into this tidal exchange analysis, based
15 on the gauge. And Mr. Schrader jumped up promptly after
16 that.

17 MR. WOTRING: Well --

18 MR. REASONER: There is serious damage done
19 here. We join in the motion.

20 MS. HINTON: Your Honor, MIMC joins in the
21 motion for mistrial, as well.

22 THE COURT: Mr. Carter, did you want to
23 respond to Mr. Wotring's argument?

24 MR. CARTER: Judge, I really don't know
25 that it needs a response. I think we recognize that

1 the -- that your order was violated. That, in fact, on
2 Page 170, the question starting at 19, Mr. Wotring, he
3 says, "And maybe everybody is getting this, maybe I'm
4 the only one not getting this; but if the river is
5 higher than the water level in this picture, how does
6 that affect your opinion?"

7 In other words, he's going back -- he's
8 trying to get it to a level so that everybody
9 understands. And the answer is, "You are just going to
10 then have more exchange going on with the tidal." And
11 that's when it kicked off.

12 Then after that, Your Honor, there is no
13 doubt what we were complaining about in connection with
14 our motion to exclude, and there is no doubt about the
15 Court's rulings on October 4 as to how you -- as to how
16 you wanted this limited simply to flood events that
17 occurred during the 1973 to 1989 time frame.

18 MR. WOTRING: And if we need to read the
19 entirety of the transcript between Page 165 and 28
20 questions later when the objection was raised, we can do
21 that; and I can do that in the speed with which I did it
22 with Dr. Bedient to reflect the time that it took. I'll
23 point to the Court that these -- the issues they
24 objected to on Page 172 were raised on page 167, Page
25 168, Page 169, prior to the quotations that counsel for

1 defendants are discussing.

2 MR. CARTER: No, Your Honor. The one final
3 thing I'll say about this is we have -- and Mr. Wotring,
4 in fact, has been chastised, or chastising of the
5 defendants for being careful about making bench
6 conferences or things like that. And Mr. Schrader was
7 very respectful in connection with his ability and his
8 making certain that this was the issue that was coming
9 up, in clear violation of your October 4 ruling. That's
10 why he -- and we've discussed it. He was very careful
11 to make certain that this is where it was going, so that
12 it could be properly identified and raised to the Court.

13 MR. WOTRING: The record should further
14 reflect that prior to Dr. Bedient getting on the stand,
15 we had a discussion with Mr. Schrader, discussing that
16 when he felt I was getting into an area, he would stand
17 and I would ask to approach the Bench or he could ask to
18 approach the Bench -- I'm not quite finished. On Page
19 167 the question was, "Now, what data do you have about
20 the river on the same day as you see this picture?"

21 And the answer was, again, to refer back to
22 the USGS data which we had been discussing, and
23 Dr. Bedient stated: "On this day, the data in the river
24 says -- the tide data -- max and min for that day,
25 maximum and minimum levels for that day never got above

1 just below mean sea level, meaning a very low level
2 because normally those values are up around 2 feet or
3 3 feet. On that particular day, it was essentially
4 .1 negative or right at mean sea level."

5 MR. CARTER: So as I understand the
6 County's argument, the County's argument now is that
7 there was -- that the defendants' conduct was
8 inappropriate and that in violation of a clear order of
9 this Court that we are standing here and we're being
10 accused of doing something. This is not a waivable
11 issue. It's a sanctionable issue.

12 THE COURT: Okay. I did read the ruling
13 into the record yesterday when we first discussed this
14 to address your -- one of your questions, Mr. Wotring,
15 the ruling that I had given all of the parties
16 previously. I'll say a couple of things about this.

17 While I think the ruling is clear from the
18 e-mail and that no one questioned what the ruling meant,
19 I also equally feel, as I expressed yesterday, that you
20 were clearly surprised when we walked back and discussed
21 the issue, and that it was obvious to me that you were
22 not in any way intentionally taking your witness through
23 testimony in violation of the Court's order. I just --
24 that was -- that's obvious to me.

25 I don't think this is an issue of waiver.

1 I think the way Mr. Schrader objected was appropriate.
2 And while I understand the concerns that the defendants
3 have, and I also appreciate from Mr. Wotring that it
4 wasn't intentional, I do not think it is a -- the result
5 should be a mistrial. However, I do think the result
6 necessarily has to be a very strong instruction, not as
7 a punishment to Mr. Wotring, but in order to be very
8 clear with the jury as to what they are to consider and
9 what they are not to consider because you have an expert
10 who testified in an area that I had excluded.

11 So I am open to suggestions on how that is
12 worded, and I suggest that it -- that in drafting that
13 it be something more than you just disregard it; but I
14 also don't want it to appear that it's in any way a
15 sanction against the lawyer. Okay? So I think we need
16 to discuss that further in terms of how that's worded.

17 So the motion for mistrial is denied. The
18 request from yesterday for an instruction is granted,
19 and we'll talk about the form of that instruction this
20 morning, I assume, so that it can be done sooner rather
21 than later with the jury.

22 So let's go off the record.

23 (Discussion off the record)

24 THE COURT: We are back on the record. We
25 have had discussions off the record, today and before,

1 about the issue of permits. And all parties agree that
2 in order to discharge waste directly into the river, a
3 permit would have been required during the penalty
4 period. All parties also agree that no permit was
5 requested or received to discharge directly into the
6 river during the penalty period.

7 Therefore, that is not -- those are not
8 issues that are in dispute; and while I respect the
9 parties' right to not enter into a stipulation, I do
10 think those are facts that are established and should be
11 established. And so the solution that we have come up
12 with as a group is that Mr. Wotring will ask the
13 defendants' corporate representatives those questions,
14 which they will agree to and, therefore, that will
15 become a nonissue in the case.

16 Obviously, he's going to be doing that
17 questioning when those corporate reps are called live
18 during the defendants' case in chief, and that will not
19 be presented during the plaintiffs' case. And because
20 of that and because of all parties' willingness to work
21 together on this issue to not put in front of the jury
22 issues that are not in dispute, we all have the
23 understanding and certainly the Court will enforce the
24 fact that his failure to do that during his case in
25 chief will not be any basis for a motion for directed

1 verdict in this case.

2 MR. WOTRING: Thank you, Your Honor. We do
3 have evidence that there was no permit through some of
4 the deposition cuts we're going to play. I think we
5 have other evidence that will survive the motion for
6 directed -- motion challenge; however, I want to be
7 safe, rather than sorry.

8 THE COURT: I do understand that and
9 respect that, and I think the defendants do, as well;
10 and that's not the intention of this agreement about how
11 to handle this issue, is to prevent you from putting
12 into the record evidence that would survive a motion for
13 directed verdict on that particular point of permitting.

14 Is that everybody's agreement?

15 MS. GRAY: Yes, Your Honor.

16 MR. CARTER: Yes, Your Honor.

17 MR. GIUGLIANO: Yes, Your Honor.

18 MR. BENEDICT: Yes, Your Honor.

19 THE COURT: Thank you. Off the record.

20 (Whereupon, after a bench discussion
21 outside the presence of the reporter and the jury, the
22 following proceedings were had:)

23 THE COURT: Let's go back on the record.

24 During the break, we all worked on an
25 instruction; obviously, this is not a stipulation. It

1 is an instruction from the Court. So if anybody has any
2 objection, I would allow them at this time to state that
3 objection.

4 MR. WOTRING: Harris County has an
5 objection to the Court reading this instruction to the
6 jury. We don't think it's appropriate under the
7 circumstances.

8 THE COURT: Any other comments?

9 MR. CARTER: Your Honor, on behalf of
10 International Paper, we reurge our motion for a
11 mistrial. This instruction will not cure the problems
12 that resulted from Dr. Bedient's testimony.

13 MR. GIUGLIANO: And Waste Management joins
14 that motion in that regard, Your Honor.

15 MS. HINTON: MIMC joins in that motion, as
16 well, Your Honor.

17 MR. BENEDICT: And I assume we have the
18 same agreement, objection for one?

19 THE COURT: Yes, sir.

20 So I have denied the defendants' motion for
21 mistrial. I have worked with the parties on an
22 appropriate instruction to give to the jury. I have
23 considered all parties' input, and I believe that at
24 this point an instruction is the proper way to address
25 this matter. And so this is the instruction I'll read

1 to the jury before we proceed with Dr. Bedient's
2 testimony. So Harris County's objection is overruled,
3 and I think, for the record, I have already said that
4 the defendants' motion for mistrial is denied at this
5 time, but the request for an instruction has been
6 granted and we will proceed.

7 MR. WOTRING: Thank you, Your Honor.

8 (After a break, the jury was present and
9 the following proceedings were had:)

10 THE COURT: Please be seated.

11 Dr. Bedient, you may take the stand again,
12 sir.

13 Ladies and gentlemen, I need to give you an
14 instruction, okay.

15 "You are instructed that you may not
16 consider the information regarding the Highway 90 gauge
17 data that Dr. Bedient testified about as evidence of any
18 mechanism of release of the waste, including dioxin.
19 Any mechanism of release," and I'm doing that in quotes,
20 "includes tidal action," so tides.

21 "You are further instructed that you may
22 not consider any of this information to support
23 Dr. Pardue's opinions. Additionally, you are instructed
24 that you are not to consider whether tidal action had
25 any impact at the site before July 1st of 1989.

1 Everyone understand the instruction?

2 All right. You may proceed.

3 MR. WOTRING: Thank you, Your Honor.

4 PHILIP BEDIENT, Ph.D.

5 CONTINUED DIRECT EXAMINATION

6 QUESTIONS BY MR. WOTRING:

7 Q. Dr. Bedient, I want to move on to another area.

8 Am I correct that you looked at some information from
9 the University of Houston studies from 2002 and 2005?

10 A. I did.

11 Q. All right. Well, tell me, generally, what
12 information did you look at in those studies?

13 A. I reviewed the sampling results from the
14 so-called TMDL study that was performed back between
15 about '02 and '05.

16 Q. And did you prepare some demonstratives to show
17 the jury about your review of that information?

18 A. I did.

19 MR. WOTRING: Could we pull up our
20 Demonstrative 141-A?

21 Q. Do you have the laser pointer?

22 A. I do.

23 Q. What are we looking at here?

24 A. We're looking at a map of the general area.
25 The pits are located here (indicating), just near the

1 Interstate, and these are sampling locations
2 (indicating). There is one here near the pits in the
3 river, No. 11193. There is one a little bit further
4 upstream, quite a bit upstream; and then there is a
5 location here downstream (indicating).

6 Q. And what do those numbers reflect? Are they
7 just identification numbers?

8 A. Yeah, they're just ID numbers for the sampling
9 locations for the five samples that were -- or the five
10 sampling locations for this study.

11 Q. And these sampling locations, they took
12 place -- well, when did they take place?

13 A. This would have been back around the '02/'03
14 time frame.

15 Q. And why is this information relevant to your
16 opinions?

17 A. These are some of the earliest sample
18 information out in the -- in the river as part of a
19 larger study, and these were sample locations in which
20 or at which they took dioxin samples in the water, as
21 well as in the sediment.

22 MR. WOTRING: Could we look at
23 demonstrative Exhibit No. 152-B.

24 Q. I think everybody knows what we're looking at,
25 the general area. Tell us what those sample locations

1 are.

2 A. This, again, is that Sample 11193, which is
3 right near -- and the pits are here (indicating). These
4 are additional sample locations sort of in a closer in,
5 follow-up sampling activity.

6 Q. And the 1193 we're looking at here is 1193 from
7 the earlier one, it's just shown a little bit
8 differently here?

9 A. 11193, yes.

10 Q. 11193 is the same one you saw in the earlier
11 map?

12 A. Yes, it is.

13 Q. And then we see -- so this is the other places
14 they're taking sample locations?

15 A. Yes.

16 Q. And you looked at those sample results?

17 A. I did.

18 Q. Okay.

19 MR. WOTRING: And let's look at Plaintiffs'
20 Exhibit No. -- or Demonstrative 142-C.

21 Q. Now, what does this show?

22 A. After the second round of sampling it was
23 decided -- based upon that information in the values
24 that were found and the results, it was decided to go
25 and do a more definitive sampling here of about 21

1 locations, although one of those locations shown here is
2 not -- not in the water. But all of these were then
3 sampled in a follow-up, I believe, in 2005.

4 Q. Okay. And did you look at that information, as
5 well? And can we move on to Demonstrative 142-B?

6 A. I did.

7 MR. WOTRING: I'm sorry, 142-E. All right.
8 Let's blow up the first table.

9 Q. Maybe I can summarize your opinions on this.
10 Is the information you got from those sample points in
11 those sample locations that we've just gone through,
12 does it give you information about whether dioxin from
13 inside the pits got outside the pits?

14 A. It does.

15 Q. And does it tell you that the dioxin from
16 inside the pits got outside the pits?

17 A. That is the way that I interpreted these
18 results, yes.

19 Q. Okay. And why don't you describe for us the --
20 well, let's walk through one of them. Let's go through
21 11193 for 2,3,7,8-TCDD, that line.

22 A. Okay. So this is a table that's showing water.
23 This is dioxin in the water, and it's in units of
24 picograms per liter, which is that very, very, very tiny
25 unit, about 10 to the minus 9 -- 12.

1 Q. I think the jury has heard something about
2 that.

3 A. Right. And we're looking at -- these are those
4 locations that we talked about earlier.

5 Q. All right. Let me just do that.

6 MR. WOTRING: Can we go back to
7 Demonstrative 142-A?

8 Q. That 11193 on the table corresponds to the
9 11193 right there; is that correct?

10 A. Yes, it does.

11 MR. WOTRING: So if we can go back to the
12 table and pull up that line again.

13 A. So these are those four sampling locations.
14 This is the number of samples that were taken. So, for
15 example, near the pit there were five samples taken.
16 And, really, the entire table is not so important. This
17 is just some statistical information.

18 The real important value is the mean here,
19 and the mean at the pit is shown to be, in this case,
20 1.09. And the other values, you'll notice, are -- and,
21 again, this is the upstream location, farther upstream,
22 and then downstream.

23 Q. Let me interrupt you.

24 A. Sure.

25 Q. I don't know that we -- maybe everybody knows.

1 I don't know that we've told everybody which way the
2 river runs. Does it run from the top of the page down
3 to the bottom?

4 A. From the top to the bottom and then underneath
5 the bridge at I-10.

6 Q. I interrupted you. What were you saying?

7 A. Well, I'm just saying that if you then look at
8 this -- this column right here (indicating) is the key
9 column in this whole table. For TCDD, 2,3,7,8-dioxin,
10 you see that by far and away the highest value -- and
11 these are a group of average numbers -- is right there
12 (indicating) near the pit and then lower upstream, much
13 lower further upstream, and then finally also lower in a
14 downstream direction, all lower than the value at the
15 pit, indicating that the pit, itself, is a hot spot.

16 Q. And by "hot spot," do you mean a source of
17 dioxin?

18 A. Yes. That's how I interpret this information.

19 MR. WOTRING: And if we can back up from
20 what we're looking at on Table 1 and go to Table 2.

21 Q. And is this, again, looking at additional
22 samples?

23 A. Yes. This is that -- this is another round of
24 sampling, a second round of sampling; and in this case
25 here we're looking at the sediment, what's in the

1 sediment.

2 Q. What was the table at the top?

3 A. It's what's in the water.

4 Q. In a dissolved phase?

5 A. Yes.

6 Q. Now, the jury has heard a little bit about the
7 dissolved phase, heard a little bit about colloids?

8 A. Yes.

9 Q. They have heard about suspended solids?

10 A. Right.

11 MR. WOTRING: Let's go back to Table 1 and
12 make sure we all know what we're looking at there.

13 Q. Is -- and is that in the dissolved phase?

14 A. Essentially, in the dissolved phase and/or
15 could be -- could be associated with very, very, very
16 tiny particles.

17 Q. Like colloids?

18 A. Like colloids, yes.

19 MR. WOTRING: Let's go down to Table 2,
20 then.

21 Q. And Table 2 is looking at the -- the -- the
22 2,3,7,8-TCDD in the sediment?

23 A. Correct, in the sediment in nanograms per
24 kilograms, just, again, a very small unit.

25 Q. And does it also show that the highest levels

1 are in the pit?

2 A. It shows the same exact distribution, this time
3 6 samples averaged to about a value of a little over 55;
4 and all of the other values, both upstream and --
5 further upstream and downstream, are significantly lower
6 based on, again, an average of a number of samples.

7 Q. And does that indicate to you that the
8 San Jacinto -- the pits are a hot spot?

9 A. Yes.

10 MR. WOTRING: And if we can go back to
11 Table 3.

12 Q. And what are we looking at in Table 3?

13 A. Table 3 is a summary of the high resolution
14 sampling. There was initially high resolution sampling
15 at five locations that we showed on that one exhibit.

16 Q. Do you remember which one that is? Is that the
17 one that --

18 A. It is the picture -- it's that one, yes.

19 Q. The big blue one?

20 MR. WOTRING: Can we look at Demonstrative
21 142-B?

22 Q. So those are the five --

23 A. Correct.

24 Q. -- locations that are -- that you're looking at
25 in Table 3?

1 A. Right. So the idea is 11193 is the point
2 nearest to the pits, and these other points were just
3 brought in a little bit closer to get a better look at
4 what's going on in and around the pits.

5 MR. WOTRING: Can we go back to Table 3?
6 I'm sorry for shifting around. Let's go back to Table
7 3.

8 Q. Those are the sample points we just saw?

9 A. These five right here (indicating).

10 Q. And what does that information tell you?

11 A. It shows a mean value of about 16 for the TCDD;
12 but more interestingly than that, it -- it shows maximum
13 values here of about 35, ranging from about 8 to 35,
14 with an average of about 16.

15 Q. And are those high readings for 2,3,7,8-TCDD?

16 A. Yes, very high readings; and that's in the
17 water.

18 Q. In the water. And, again, do you believe that
19 those samples --

20 A. I said that wrong. I'm sorry. It's in the
21 sediment.

22 Q. Those are readings from in the sediment?

23 A. Yes.

24 Q. And, again, do you believe that those readings
25 support your opinion that dioxin from inside the

1 impoundments got outside the impoundments?

2 A. Yes.

3 Q. And why don't you describe for us how Table 3
4 and the information it summarizes supports your opinion
5 on that issue.

6 A. It's, again, just the concept that you are
7 getting these very hot samples, much higher
8 concentrations in and around and close to the pit, and
9 then significantly decreasing as we go either upstream
10 or downstream. It's best shown by the 21 samples that
11 were collected in a very, very close -- in the Summer of
12 2005.

13 And here you see averages of about a little
14 over a thousand for that sampling group, but highest
15 value at 22,000; and that would be directly inside the
16 pit. The actual reported number in a slightly different
17 unit of TEQ is 32,752 inside the pit.

18 Q. At the 111193 location?

19 A. Actually, no, inside the pit. If you'll put
20 that other exhibit up, I'll point to that location.
21 It's the exhibit with the 21 samples.

22 So, again, this is just zooming in, closer
23 and closer in and around the pit area.

24 MR. WOTRING: If we could go to
25 Demonstrative 142-C.

1 Q. So this one is looking at the sample results
2 from -- well, you tell me. Are these the sample results
3 that we just looked at in Table 3?

4 A. That's the average of those 21 samples, and
5 .15, that point right there (indicating), is the one
6 that is inside the pit. And, of course, at that time
7 this pit was submerged.

8 Q. Okay. And let's go back to Table 3 briefly so
9 we can reorient everybody there.

10 A. That's this value that's driving it, the 32,000
11 for the TEQ; and that is actually at Location 15.

12 Q. And this information that we've just been
13 talking about came from the University of Houston study?

14 A. Yes, this was all done by the University of
15 Houston.

16 Q. And do you know the chief scientist involved in
17 that?

18 A. I do. Her name was Dr. Hanadi Rifai. She was
19 a former student of mine, colleague, and I know her
20 quite well.

21 Q. Did you happen to teach her?

22 A. I did.

23 Q. And were you involved with her when she was
24 trying to get her doctorate?

25 A. I directed her Ph.D. work, and then she was

1 what is called a post doc. After the Ph.D. she worked
2 with me for about five years.

3 Q. Let me cover a few more points with you. The
4 area around the pit -- where the San Jacinto River is
5 around I-10, is that -- is there a chance that there may
6 be flooding involved there?

7 A. Oh, yes. This is a major river in East Texas,
8 and it's prone to floods.

9 Q. And have you looked at the number of floods
10 involved in the area over the period of time from --
11 well, let me ask you: Did you look at how many floods
12 had been in the area?

13 A. I have looked over the period of record of
14 interest here from, essentially, 1973 forward.

15 MR. WOTRING: And can we look at our
16 Demonstrative Exhibit No. 142-D?

17 Q. Okay. What are we looking at here?

18 A. Here you're looking at the so-called stage
19 heights of the floods, historical crests of the floods
20 in and around the area; and you're looking at those
21 recorded values. You'll notice, for example, 1973 here
22 (indicating) is just over 20 feet. This one is the
23 highest on record of a little over 27 feet, and that was
24 the big 1994 flood of record on -- on the -- literally
25 on the San Jacinto River.

1 Q. So how many -- how many times over this period
2 of time we're looking at from 1973 through 2013 were
3 there flood events on the San Jacinto River near these
4 impoundments?

5 MR. GIUGLIANO: Objection, Your Honor,
6 relevance as to post penalty.

7 THE COURT: Time frame.

8 Q. (By Mr. Wotring) How many flood events were
9 there as reflected on -- well, in your work in this case
10 between 1973 and January of 2008?

11 A. If you discount these two, it would be 25.

12 Q. 25 flood events --

13 A. Yes.

14 Q. -- in the San Jacinto River from the period of
15 time January 1973 through it looks like January of 2008?

16 A. Yes.

17 Q. Okay. Now, is the area of the San Jacinto
18 River around the I-10 bridge, is that also subject to
19 being affected by tropical storms?

20 A. Oh, yes. Oh, yes.

21 Q. And hurricanes?

22 A. Decidedly, yes.

23 Q. And I believe you've done some calculations in
24 your report -- well, that's all right. We can move on
25 from that.

1 One final thing, Doctor. I want to go back
2 to the berm and the impoundments and the pictures that
3 we had been looking at yesterday and ask you some
4 questions about that.

5 MR. WOTRING: First can we look at
6 Exhibit 386-8b?

7 A. Is there a way to get those pictures on here?
8 They're not showing up here.

9 THE BAILIFF: There is a power button on
10 the side.

11 THE WITNESS: I'll let you --

12 THE BAILIFF: There it is.

13 THE WITNESS: Thank you.

14 Q. (By Mr. Wotring) I think we looked at this
15 yesterday. We're going to touch upon these real
16 briefly. Then I think I'm concluding my questions to
17 you.

18 You saw the breach in the impoundments on
19 this figure from 1973, correct?

20 A. Yes.

21 Q. And are you aware of any information that there
22 was maintenance of these levees and berms from 1973 on
23 through the end of the penalty period in 2008?

24 A. I have seen no evidence in anything that I have
25 looked at in any of the documentation.

1 Q. Okay. Let's move on to 386-10b, the 1976
2 photograph. My question about this is do you see the
3 same breach in the impoundment in the 1976 picture?

4 A. Yes. This -- this particular photograph, the
5 breach shows up better than almost in any of the photos.

6 Q. Okay. And if there was no maintenance of the
7 impoundments from 1973 on through the end of the penalty
8 period, would that berm heal itself?

9 Let me do it this way: Do you have an
10 opinion, based upon reasonable scientific probability,
11 about whether the breach in that berm would -- would
12 fill up if there was no maintenance on the levees?

13 A. I do.

14 Q. And what is that opinion?

15 A. I don't believe it's going to heal itself,
16 especially given that it is -- the way that it is
17 located juxtaposed out into the middle of the river,
18 with the river rapidly coming by in a bend of the river.

19 MR. WOTRING: If we could see 386-11b.

20 Q. And do you see the breach in 386-11b?

21 A. I do.

22 Q. And does that appear to be the same breach that
23 you've seen in the other two photographs?

24 A. Yes.

25 Q. Let me ask you to look at 386-13b. And do you

1 see the area of the -- do you see a breach in the
2 impoundments in 13b?

3 A. I do.

4 Q. That's a 1981 photograph.

5 MR. WOTRING: Let's look at 14b.

6 Q. It's a little bit fuzzier.

7 A. It's fuzzy, but it's still there.

8 Q. You can still see the breach in the
9 impoundments?

10 A. Oh, yes.

11 MR. WOTRING: Can we look at 386-15b?

12 A. Again, clearly shown in 1985.

13 MR. WOTRING: And 386-16b?

14 Q. Do you see a breach in the impoundment in that
15 picture?

16 A. A lot of inundation in that picture; but, yes,
17 the breach is there in '89.

18 Q. Well, what you see is just the inundation of
19 almost the entire eastern pit?

20 A. Yes.

21 Q. All right. And one final photo I'm not sure we
22 looked at is 386-17b. Do you see a breach in the
23 impoundments in this photo?

24 A. Very clearly shown here.

25 Q. In all the photos we've looked at, has the

1 contents of the San Jacinto River been in connection
2 with the inside of the pits?

3 A. In each and every photograph that we have seen
4 here, the connection is shown and the breach is shown,
5 yes.

6 Q. Okay. And if there was dioxin in the water, in
7 the impoundments, and I'll be specific, in the eastern
8 most impoundment in these photos, would that dioxin be
9 able to travel freely from inside the impoundment to
10 outside the impoundments, if there were a breach?

11 A. Oh, absolutely.

12 MR. WOTRING: Dr. Bedient, that's all the
13 questions I have.

14 THE COURT: Mr. Schrader.

15 MR. SCHRADER: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 QUESTIONS BY MR. SCHRADER:

18 Q. Good morning, Dr. Bedient.

19 A. Good morning.

20 Q. We met out in the hall a couple of days ago,
21 right?

22 A. We did.

23 Q. Again, I'm David Schrader. I represent
24 International Paper in this case. And you understand
25 that International Paper's involvement is through

1 Champion?

2 A. Yes.

3 Q. I just want to clarify a couple of things up
4 front. We took your deposition as the corporate
5 representative for Harris County awhile back, and you
6 agree that neither Champion nor International Paper
7 designed or built the impoundment we've been talking
8 about, right?

9 MR. WOTRING: Your Honor, I'm only going to
10 lodge an objection that I don't think he was designated
11 as a corporate representative on those topics; but I
12 don't have any problem with him answering.

13 THE COURT: You may answer, sir.

14 A. I don't know. I have no knowledge of that.

15 MR. SCHRADER: Okay. We'll put that in
16 later.

17 Q. (By Mr. Schrader) And just -- just to confirm
18 in this case, you don't work for Harris County, right?

19 A. No.

20 Q. Never have worked for Harris County, right?

21 A. No.

22 Q. The -- the information that you've gotten about
23 Harris County's positions in this case have all come
24 from the outside attorneys for Harris County, right?

25 A. They have.

1 Q. And they have hired you and they're paying for
2 your time and work on this case, right?

3 A. Yes, sir.

4 Q. Let me ask you about the waste material that
5 was put into the impoundments, okay?

6 A. Okay.

7 Q. And is it correct you've told us before that
8 that waste material is of a nature that it gets
9 compacted over time?

10 A. Well, all -- any and all information about
11 waste material coming into the pits was basically the
12 responsibility of Dr. Pardue; and so I have -- that is
13 not part of my scope in this -- in this -- in this
14 project.

15 Q. Let me just ask you this: When -- when your
16 deposition was taken as the Harris County
17 representative, and this is on Page 96, do you recall
18 being asked, "And it would attach to the sides and the
19 bottom of what it was put into, right?" And you said,
20 "It would." Right?

21 A. Well, that's a little different question than
22 you asked originally, so I guess I'm confused.

23 Q. So the waste material -- we're talking about
24 the paper mill sludge?

25 A. Yes.

1 Q. First you told us -- and this is on Page 97 of
2 your deposition. Would you like to see your prior
3 deposition?

4 A. Yeah. I would just like -- my screen went
5 away.

6 Q. We're not showing you any documents yet. So
7 we're good on that.

8 A. Oh, okay.

9 THE COURT: He wasn't tricking you.

10 MR. SCHRADER: So thought he was tricking
11 me.

12 Q. (By Mr. Schrader) I just want to talk about
13 the paper mill sludge.

14 A. Okay.

15 Q. And you told us -- and this is when you were --
16 your deposition was taken as a Harris County
17 representative.

18 A. Okay.

19 Q. This is Page 97, "Okay, let's talk about the
20 paper sludge. The paper sludge gets compacted, right?"

21 And you said "It does."

22 You agree with that?

23 A. I agree with that.

24 Q. And then you were asked: "And it would attach
25 to the sides and the bottom of what it was put into,

1 right?"

2 And you said "It would."

3 A. I'll agree with that.

4 Q. You agree with that?

5 A. Yeah.

6 Q. So when the material was put into the
7 impoundment that we're talking about here, over time it
8 would attach to the sides and the bottom of that
9 impoundment, right?

10 A. That's what I said at that time, yes.

11 Q. And you agree with that, right?

12 A. I do.

13 Q. And you've seen from the photographs we've
14 looked at, the western impoundment where the material
15 was placed into, you've seen plants and trees and things
16 that have grown right into there, right?

17 A. I have.

18 Q. Okay. In some of the questioning that was
19 asked, there were references to pits or pit. And I just
20 want to make clear, for your purposes you did not
21 attempt to offer an opinion about a release from the
22 different pits that have been involved in there, right?
23 You've looked at it as one facility, right?

24 A. That is correct. I essentially looked at it as
25 this -- this one facility.

1 Q. Right. So, in other words, you've not said
2 there is a -- there was a release from the western
3 versus the middle, that sort of thing, right?

4 A. That's correct. I -- I deferred a lot of that
5 to Dr. Pardue who dealt with the pits, themselves.

6 Q. Okay. You were asked some questions about
7 flooding, and you gave some dates where some flooding
8 events occurred. You agree there were plenty of days
9 between 1973 and 2008 when there was no flooding of the
10 impoundment, right?

11 A. Oh, yes, sir. Absolutely, yes.

12 Q. And let me ask you about some particular days
13 here that are involved within the penalty period, and I
14 know this was the one that was used in your deposition,
15 which was May 8th of 1977. I'm not sure why the person
16 picked that date, but they did.

17 A. They probably picked it because it was missing
18 data, but I don't know.

19 Q. So -- so for that date, you cannot tell us
20 whether there was a release of waste material into the
21 river on that date, right?

22 A. In which year?

23 Q. May 8th, 1977?

24 A. Well, what I do know is that by that point in
25 time, a breach was certainly present in the levee and

1 out in the river, and all of the photographs and all of
2 the evidence that I have seen shows that there was a
3 connection starting in '73, certainly shown in '76. And
4 so the opportunity certainly is there for there to be
5 exchange on that day.

6 Q. The opportunity?

7 A. Yes. Now, do I know the exact elevation of
8 water and all of that on that particular day? I -- I
9 don't know.

10 Q. And you would need that information in order to
11 offer an opinion whether on that particular day there
12 was a release, right?

13 A. On that particular day.

14 Q. And if I were to ask you similar questions and
15 pick other days for which there were not photographs,
16 your answer would be the same?

17 A. Well, there -- there is -- and it's in my
18 opinion and in my deposition, where we've talked
19 extensively about this river being subject to tides. I
20 mean, it's tidally influenced by water.

21 MR. WOTRING: Your Honor, can we approach?

22 THE COURT: Yes.

23 (Whereupon, after a bench discussion
24 outside the presence of the reporter and the jury, the
25 following proceedings were had:)

1 THE COURT: Ladies and gentlemen, I'm going
2 to let you-all step out for just a second while we
3 address an issue and then we'll bring you back.

4 Please proceed.

5 (Whereupon, outside the presence of the
6 jury, the following proceedings were had:)

7 MR. WOTRING: Dr. Bedient, I want to make
8 sure that in light of some of the Court's previous
9 rulings, you had an understanding about how you could
10 answer these questions consistent with you being under
11 oath?

12 THE WITNESS: Yes.

13 MR. WOTRING: And consistent with the
14 Court's instruction and to avoid any further, shall we
15 say delay in the proceedings. So the question you were
16 asked is, I think, information about exchanges from
17 inside the pits and outside the pits and you answered
18 there was tidal action.

19 THE WITNESS: Yes.

20 MR. WOTRING: I don't know what the next
21 question is going to be, but I want to try and have you
22 instructed so as not to run afoul of any of the Court's
23 previous instructions or rulings.

24 THE COURT: And I think, actually, to be
25 fair to Dr. Bedient and to all the lawyers, I think you

1 should go ahead and read what that question is going to
2 be.

3 MR. WOTRING: I'll note we're outside the
4 presence of the jury.

5 THE COURT: Yes. Thank you. That's a good
6 point to note on the record, that we're not all just
7 chatting in front of the jury. So why don't do you
8 that, Mr. Schrader.

9 FURTHER CROSS-EXAMINATION

10 QUESTIONS BY MR. SCHRADER:

11 Q. Dr. Bedient, in your deposition as the
12 corporate representative, you were asked about that
13 May 1977 date, which I just covered, and you answered
14 about it. And then the next question was, "And if I
15 asked you the same question about any specific dates
16 between 1966 and 2008, you would give me the same
17 answer?" And you said, "Yes."

18 So what I was proposing to do was just
19 simply ask the next question and say: "Do you recall
20 being asked in your deposition, and if I asked you the
21 same question about any specific day" -- and I'm going
22 to change 1966 to 1973, just so we're in the penalty
23 period -- "and 2008, would you give me the same answer?"
24 And your answer was, "Yes."

25 And I would just ask, do you remember being

1 asked those questions or that question and giving that
2 answer, that's all I would ask you.

3 A. I remember those questions being asked.

4 MR. WOTRING: And giving those answers?

5 THE WITNESS: And giving those answers.

6 MR. WOTRING: I would note for the record
7 that he's not here in his corporate representative
8 capacity and I think phrasing the question that way --

9 MR. SCHRADER: I can just put it "at your
10 deposition."

11 MR. WOTRING: I think that would be better.

12 MR. SCHRADER: Sure.

13 THE COURT: Okay. And just so we're clear,
14 because of, again, not only the Court's rulings but then
15 the instruction, we need to make sure, Doctor, that
16 while I understand it's part of your opinions from where
17 we are in the trial, that you not offer that there is
18 tidal action during that time period between '73 and
19 '89. Okay?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Thank you.

22 THE WITNESS: Now, in other words, don't
23 mention the word "tidal," basically?

24 THE COURT: Correct.

25 THE WITNESS: Thank you.

1 MR. WOTRING: And I would ask that if he's
2 under oath, phrasing the question then placed so as to
3 not put him in an awkward position having to --

4 THE COURT: That's why we're doing this
5 outside the presence of the jury, so that no one is in
6 an awkward position, including Dr. Bedient.

7 THE WITNESS: And I apologize for creating
8 yet another delay.

9 MR. WOTRING: You don't need to do that.
10 Let's also say that -- if I may remind Dr. Bedient that
11 if he is getting a question that places him in a
12 position of having to answer contrary to either the
13 Court's instructions or his oath, that he can say "I'd
14 like to" -- "I don't know how to" -- "I need some
15 guidance on how I can answer that question."

16 THE COURT: Yes, sir. That's sort of the
17 buzz phrase we've agreed to --

18 THE WITNESS: I need guidance.

19 THE COURT: -- if you are in a situation
20 where you feel like one of those things would happen.

21 THE WITNESS: Very good.

22 MR. SCHRADER: I've got maybe five more
23 minutes.

24 THE COURT: That's fine. Let's line them
25 back up.

1 (Whereupon, the following proceedings were
2 had in the presence of the jury:)

3 THE COURT: Please be seated.

4 You may continue, Mr. Schrader.

5 CONTINUED CROSS-EXAMINATION

6 QUESTIONS BY MR. SCHRADER:

7 Q. Dr. Bedient, let me just ask you if you
8 remember a deposition and being asked these questions
9 and giving these answers. The question was: "Okay.
10 May 8, 1977, was there a release of waste material from
11 the site into the river?"

12 "ANSWER: Don't have specific information
13 on that day.

14 "QUESTION: And if I asked you the same
15 question about any specific day between 1973 and 2008,
16 you would give me the same answer?

17 "ANSWER: Yes."

18 Do you remember that?

19 A. I remember that, yes.

20 Q. Very good. I think the jury has heard this
21 before, but we're talking about dioxin. You agree that
22 dioxin is one of the most hydrophobic compounds there
23 is?

24 A. Yes.

25 Q. That means it doesn't want to go into water?

1 A. Correct.

2 Q. The last topic, I want to ask you about
3 dredging, okay?

4 A. Okay.

5 Q. You're familiar with dredging, generally,
6 right?

7 A. I am.

8 Q. There is a machine that can dig into an area
9 and then pull that material out with like a suction of
10 some sort?

11 A. Yes, it -- yes.

12 Q. And you agree that dredging into the waste pit,
13 the impoundment here, could cause material to escape
14 into the river, right?

15 A. If, indeed, that happened, yes, yes, it could.

16 Q. Because the materials are being cut up, broken
17 apart, and then moved out, right?

18 A. Yes.

19 Q. And when -- when you prepared your opinions in
20 this case, am I correct that you did not know that there
21 was dredging into the impoundment?

22 A. That's correct.

23 Q. Let's look at Exhibit -- it's Demonstrative
24 Exhibit 142-C. Okay. So this is one of the
25 demonstratives that -- can you see that?

1 A. Yes.

2 Q. This is one of the demonstratives that you
3 looked at earlier with counsel for Harris County. And
4 it's difficult to see this up on the screen but --

5 MR. SCHRADER: Is there any way to change
6 the lighting on this at all? No? Okay. We're stuck
7 with that. That's okay -- that's a little bit better.

8 Q. So what we're looking at here, you told us
9 earlier, were some of the test results that were taken
10 in this area?

11 A. Yes, sir.

12 Q. And there is a red outline here which shows the
13 outline of the impoundment, right?

14 A. Yes, sir.

15 Q. And then right to the left of that, there is
16 a -- a yellow circle. What does that yellow circle
17 indicate?

18 A. It says "Recent sand mining operations."

19 Q. So you now, understanding that what happened
20 here was that a dredger came into the impoundment here,
21 dredged some of the waste material out, and then moved
22 it over to this area here to the left that's in the
23 northwestern portion of that circle, right?

24 A. I don't know that for -- I don't know that. I
25 have not seen information on that.

1 Q. You don't know that there was a dredger that
2 dredged right into the impoundment here, took the
3 material out, moved it over to this area to the left,
4 and did a sand separation process, where they separated
5 out the sand that they had dredged out and then put the
6 rest of the material, the rest of the waste material
7 right back into the river? You're not aware of that?

8 A. No, I'm not aware of that.

9 Q. Is it -- is it true, Dr. Bedient, that the
10 reason that Harris County has not asked you to evaluate
11 dredging and whether it caused material to release into
12 the river is because none of the defendants here in this
13 case did that dredging?

14 A. I have no idea. I can't answer that.

15 Q. This is from the July 19, 2013 deposition at
16 Page 108, Lines 10 through 20. Let me ask you,
17 Dr. Bedient, if you recall being asked these questions
18 and giving these answers:

19 "QUESTION: Well, what if somebody dredged
20 into the site and actually scooped out material from the
21 site? That would certainly cause material to escape
22 from the site, correct?

23 "ANSWER: If they did that, yes.

24 "QUESTION: Absolutely. And you haven't
25 examined that on behalf of Harris County, right?

1 "ANSWER: That is correct.

2 "QUESTION: Okay. That's because none of
3 the parties that are defendants in this case did the
4 dredging, right?"

5 "ANSWER: Right."

6 A. Yes.

7 Q. Do you remember those questions and answers?

8 A. Sure.

9 MR. SCHRADER: I have no further questions
10 for you. Thank you very much.

11 THE WITNESS: Thank you.

12 THE COURT: Ms. Gray.

13 MS. GRAY: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 QUESTIONS BY MS. GRAY:

16 Q. Good morning, Dr. Bedient.

17 A. Good morning.

18 Q. Melanie Gray, representing McGinnis Industrial
19 Maintenance Corporation.

20 You've testified that you're relying upon a
21 February 1973 photograph to establish that there was a
22 breach in the levee as of that date and for every day
23 for which you have a photograph thereafter, correct?

24 A. Yes.

25 Q. Okay. Now, you're not an aerial photography

1 expert, are you?

2 A. Well, no; but I have spent a great deal of time
3 working in and around aerial photographs my entire
4 career.

5 Q. You don't know whether -- how deep the breach
6 was in the levee on that day in February of 1973, do
7 you?

8 A. No, I don't.

9 Q. And you don't know how deep that breach was for
10 any day thereafter for which there was a photograph, do
11 you?

12 A. I don't know the depth; but based upon the
13 aerial photos that I have seen, especially in 1976, it's
14 clear to me that the breach was deep enough that there
15 was a direct connection to the river.

16 Q. For every day between the photographs in
17 February of 1973 until the photograph in 1976, you
18 don't -- you have not done any analysis to determine how
19 deep the breach was for each and every one of those days
20 between that period of time, have you?

21 A. That's correct.

22 Q. Okay. Now, Dr. Bedient, you recall in your
23 deposition and in some previous testimony that you
24 talked about groundwater mounding?

25 A. Yes.

1 Q. And groundwater mounding -- and I am not a
2 hydrologist, I can assure you -- I understand is when
3 there is a buildup of water underneath the ground? Or
4 can you describe what it is?

5 A. Yes. It typically involves a layered system.
6 So the shallow system might have a buildup of water due
7 to excessive recharge or excessive water on the top. So
8 it's coming in faster at the top than it's leaving out
9 the bottom. So, therefore, it mounds up like an
10 umbrella.

11 Q. And in your deposition you'd agree that there
12 was a groundwater mound beneath this site in question,
13 correct?

14 A. Yes.

15 Q. And it's also your opinion that although the
16 defendants may not agree with you, that at least the
17 central berm was made of a silty sand all the way down
18 to 38 feet, correct?

19 A. Yes. That's what -- that's what I saw when
20 I -- when I looked at the available data.

21 Q. Right. And that's the central berm that
22 divides what we've been referring to from time to time
23 from the western area or basin to the eastern basin?
24 You understand that?

25 A. Yes, I do.

1 Q. Now, you didn't look at any other boring
2 results for tests of the outside of the impoundment, did
3 you?

4 A. Not really, no.

5 Q. And you don't have any information as to
6 whether the -- how the construction of the central berm
7 relates to the materials of the outer berms, do you?

8 A. That is correct.

9 Q. Okay. Now, going back to this 38 feet of what
10 you maintain is a silty sand in the central berm, you
11 would agree that that creates pretty much a conduit of
12 water that would flow down over time to the groundwater
13 mound, if there is a hydro -- hydro -- help.

14 A. Geologic --

15 Q. -- geologic --

16 A. -- connection.

17 Q. -- connection?

18 A. Yes.

19 Q. And you agree that there was a hydrologic
20 connection between that berm and this groundwater mound?

21 A. Yes.

22 Q. Okay. And I'm sure you're also aware that
23 there is no evidence in this case that there is dioxin
24 that was transported into that groundwater, correct?

25 A. That is correct.

1 Q. You've talked about flooding. And you have not
2 done any analysis to figure out for any of those 25
3 flood events how many days, other than the day in
4 question that's charted on there, water would have been
5 over the impoundment, have you?

6 A. While I did not do a detailed analysis of that,
7 I did report in my deposition that most of those floods
8 last for several days, two or three days.

9 Q. But you have not analyzed specifically whether
10 or not for each of those events that is, indeed,
11 correct?

12 A. I'll agree with that.

13 Q. All right. Now, you made reference to -- if I
14 can -- water -- river water rapidly coming by in your
15 direct testimony. Do you recall that?

16 A. Yes.

17 Q. Is that what you also refer to from time to
18 time as scouring velocity?

19 A. Well, you -- you could refer to that, if the
20 river is at a high enough elevation of velocity or value
21 of velocity, yes.

22 Q. And you've not done any analysis with regard to
23 what the scouring velocity of the river was at the site
24 for any day in question in this lawsuit, have you?

25 A. That is correct.

1 Q. Okay. And in -- following up on some of
2 Mr. Schrader's questions about the waste that was in the
3 pits adhering or connecting to the sides or the bottom
4 of the basins -- do you recall that, his questions?

5 A. Yes.

6 Q. You understand that there would have to be some
7 sort of force to move any of that out of the basin,
8 correct?

9 A. Well, if that's the only place in which the
10 waste is contained. I've heard testimony and I've seen
11 reports from Dr. Pardue that show that the wastes are
12 also entrained in colloids in the water column.

13 Q. Well, I'm talking about the waste in the
14 impoundments; and that's what you were talking about
15 when you answered Mr. Schrader's questions?

16 A. Yes. In the way that he asked them, yes.

17 Q. All right. So with regard to that waste, it
18 would take some external force to move that out of the
19 impoundments, correct?

20 A. If you're only talking about waste that would
21 be attached to the sides of the impoundments, yes,
22 that's correct.

23 Q. And you've done no analysis to determine how
24 much force or scouring velocity would be necessary to
25 have that occur, correct?

1 A. Correct.

2 Q. Your opinion is just that there may be
3 potential for scouring?

4 A. Yes.

5 Q. Okay. Now, you would agree that this whole
6 area of the San Jacinto River has suffered from
7 subsidence over time, correct?

8 A. It has been prone to subsidence, yes.

9 Q. Not just prone to subsidence, it has indeed
10 dropped, I believe you testified some or agreed with one
11 of the other experts, 10 1/2 feet over time?

12 A. Over a very long period of time.

13 Q. And that very long period of time goes back to
14 the early 1900s through 2000 --

15 A. The '70s, something like that.

16 Q. The '70? You would agree that the major cause
17 of subsidence during that period of time was the
18 extraction of groundwater in that area for industry and
19 growth, you know, residential and other commercial
20 growth in the area?

21 A. Yes.

22 Q. And that growth period began essentially in the
23 1950s, '60s, and into the '70s, correct?

24 A. It did.

25 Q. So that you would agree, although we don't have

1 any precise measurement, that the subsidence that
2 occurred, this 10 1/2 feet, would have occurred over
3 that period of time?

4 A. I would agree with that.

5 Q. Okay. Now, the defendants are not responsible
6 for the fact that groundwater was being sucked out at a
7 rate that dropped this impoundment down or caused it to
8 lower, correct?

9 A. That's correct.

10 MS. GRAY: With that, I'm done. Thank you,
11 Dr. Bedient.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Giugliano.

14 MR. GIUGLIANO: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 QUESTIONS BY MR. GIUGLIANO:

17 Q. It is afternoon, so I'll say good afternoon. I
18 was about to say good morning. How are you?

19 A. It is afternoon. Thank you. I'm doing well.

20 Q. My name is Mark Giugliano. I represent Waste
21 Management. We haven't met before, correct, sir?

22 A. No, no.

23 Q. I have the pleasure of going third, so I'm
24 going to cut my questions wherever I can, given the
25 number of questions you received.

1 A. That's the best thing I've heard all morning.
2 Thank you.

3 Q. I'll do my best. So if you see me flipping
4 pages, forgive me?

5 A. I won't.

6 Q. Dr. Bedient, when you were talking about your
7 qualifications, I recall that you have significant
8 experience with remediating sites, correct?

9 A. I do.

10 Q. Okay. And I know you've been in the courtroom
11 at various points throughout this trial, correct?

12 A. Yes, I have.

13 Q. And I'm not sure if you were here at the
14 beginning when the Court read in what we call a
15 stipulation into evidence and presented it to the jury,
16 right before we began the trial.

17 A. No, I wasn't.

18 Q. There is one thing I want to clarify. What the
19 Court read in, in part, was part of this statement:
20 "Since 2008 the EPA has been overseeing the
21 environmental investigation, removal, and remediation of
22 the site that is being performed or paid for by the
23 defendants as required by federal law. That process is
24 ongoing and will result in the EPA selecting a method
25 for permanently cleaning up the site."

1 Did you hear that before or not?

2 A. I have not heard that before, no.

3 Q. I just want to make sure that none of your
4 opinions that you are offering here today are addressing
5 anything to do with the remediation of the site,
6 correct?

7 A. Not at all.

8 Q. Dr. Bedient, we saw and you testified to the --
9 there is a map and there were several testing sample
10 stations along the San Jacinto River, correct?

11 A. Yes, yes.

12 Q. And some of them were far upstream from the
13 site and some were below the site downstream, correct?

14 A. Yes.

15 Q. And you're aware, sir, that there are many
16 sources of dioxin in the river other than, in your
17 opinion, this site, correct?

18 A. There are other sources out there. There are
19 sources also in the Houston Ship Channel.

20 Q. Okay. And some of those sources, you'd agree,
21 are upstream of the site, correct?

22 A. They might be.

23 Q. And as you indicated I think when Mr. Wotring
24 asked you before, the flow of this river is from the top
25 down, correct?

1 A. It is.

2 Q. Okay. And you'd agree with me, sir, would you
3 not, that in this river, in the segment right near the
4 site, you know that there are other sources of dioxin
5 around the site, correct?

6 A. You would have to be more specific when you say
7 the word "near."

8 MR. GIUGLIANO: Well, let's pull up your
9 deposition, Volume 2, Page 310, please, Line 13 through
10 18.

11 THE WITNESS: Somehow I knew you'd have
12 something to show me.

13 MR. GIUGLIANO: You can go up to 12. I'm
14 sorry. I can't read my writing.

15 Q. And that was referring to -- you've testified
16 that there were many sources of dioxin in the segment.
17 That's the breakdown of the river right around the site
18 that we've been discussing.

19 Your answer was "I have said there are many
20 sources of dioxin, yes."

21 A. I'm not sure there that the word there
22 "segment" refers to right where we're talking. The
23 segment is actually a much larger area. So that would
24 be my only comment.

25 Q. In any event, sir, you would agree with me,

1 though, that you know that there are numerous other
2 dioxin sources near the site, correct?

3 A. There are other sources, yes.

4 Q. And I believe you testified to it being
5 numerous, correct?

6 A. I say here "many," yes, sir.

7 MR. GIUGLIANO: Scroll down two lines,
8 please. I'm sorry. I'm going in the wrong direction.
9 Up a little bit. I have the wrong page. So I'll move
10 on, sir.

11 THE WITNESS: Thank you.

12 Q. (By Mr. Giugliano) Dr. Bedient, have you
13 independently studied any of those other sources along
14 the San Jacinto River, other sources of dioxin?

15 A. No, I have not.

16 Q. And you didn't analyze any of those other
17 potential sources, other than what you've read in the
18 documents provided to you in this case, correct?

19 A. That is correct.

20 Q. All right. Now, the jury heard me ask some of
21 these questions of Dr. Pardue; and so I'm going to go
22 through them quickly for you, just to make sure that
23 y'all are on the same page.

24 You understand that with respect to my
25 client, Waste Management, they were not at all involved

1 or related to any company related to this site until the
2 end of 2003, correct?

3 A. I actually don't know any details about when
4 purchases were made or any of that. Dr. Pardue might
5 know that, but I do not.

6 Q. Okay. Well, you know, you've reviewed the
7 historical documents from the time back in the '60s with
8 regard to the construction and design of the site,
9 correct?

10 A. Yes.

11 Q. And you know that Waste Management wasn't at
12 all involved back in the '60s with the design or
13 construction, right?

14 A. Absolutely, yes.

15 Q. And wasn't at all involved with the generation
16 of the waste or the selection of the site, correct?

17 A. I do know that, yes.

18 Q. And you know that Waste Management never
19 operated on the site, correct?

20 A. Correct.

21 Q. I think one of your -- one of your opinions
22 that you discussed before was you felt that the site was
23 initially selected too close to the river, right?

24 A. Yes.

25 Q. And, again, that wasn't anything of Waste

1 Management's doing, correct?

2 A. I believe that's correct, yes.

3 Q. You testified before, sir, that -- about some
4 of the mechanisms about how dioxin was -- there was an
5 opportunity for the dioxin to be released from the site,
6 correct?

7 A. Yes.

8 Q. And you'd agree with me that there is a
9 difference between conditions creating the potential for
10 dioxin to be released and documenting it and showing an
11 actual release on a given day, correct?

12 A. Oh, I agree with that.

13 Q. And you understand that in this case Harris
14 County is seeking penalties for each day and Harris
15 County is required to show a release each day, correct?

16 A. I know that they're seeking those penalties,
17 yes.

18 Q. Okay. And I think Mr. Schrader touched on
19 this. You -- you've looked at the site as a whole, but
20 you haven't analyzed whether there is any release from
21 any of the individual pits on any day, correct?

22 A. I've looked at it -- I've looked at the whole
23 period and I have talked about the various mechanisms of
24 release that could occur, and that's clear in my report,
25 as well as in the deposition testimony.

1 Q. Just to be clear, you can't say that there was
2 a release from all three pits on any given day, correct?

3 A. That's a correct statement.

4 Q. Okay. And you understand that Harris County is
5 not seeking a penalty for any days where there are no
6 releases, correct?

7 A. Correct.

8 Q. I believe I heard you testify when you were
9 talking about the concentrations and the studies there,
10 some of those studies were done in 2002, correct?

11 A. Yes.

12 Q. All right. And you believe, after looking at
13 those studies, that the greatest concentration that was
14 detected was in the impoundment, itself, correct?

15 A. Yes, in the water and in the sediment in that
16 eastern impoundment.

17 Q. In the impoundment?

18 A. Yes.

19 Q. And that tells you, does it not, that you
20 believe that much of the dioxin is still in the
21 impoundment, correct?

22 A. I believe so.

23 Q. Okay. And you haven't quantified at any point
24 in time how much you think got out, correct?

25 A. That is correct.

1 Q. And you've done no analysis or study that shows
2 where any of the dioxin that you believe got out, where
3 it ended up, correct?

4 A. Other than just a general statement of the
5 distribution of dioxin both upstream and downstream, as
6 you've already seen today.

7 Q. But that wasn't your study?

8 A. No. But that was a bona fide TMDL study
9 performed by a very qualified group.

10 Q. And that study doesn't link the dioxin to this
11 site -- from this site to the location upstream,
12 correct?

13 A. That's correct.

14 Q. And you cannot, Dr. Bedient, tell this jury
15 that on any specific location on that map in the river
16 that there is a -- there is a concentrated amount of
17 dioxin that came out of this impoundment, correct?

18 A. Not a specific value in the river associated
19 with -- no. In other words, not in the way you've asked
20 the question.

21 Q. And you can't tell us today on any day an
22 amount of dioxin that came out of that site, correct?

23 A. That's correct.

24 Q. And you can't tell us any measurement that you
25 discussed before, whether that dioxin -- that

1 concentration that was seen in the measurement was from
2 this site or from another source, correct?

3 A. Again, my opinion is clear that based upon the
4 distribution of dioxin that was shown in the study from
5 the University of Houston, and other studies that I have
6 seen, this source, this site is largely responsible, as
7 I have said in my -- in my deposition, for the
8 distribution of dioxin that's measured there. There are
9 other sources out there, and I have admitted to that.

10 Q. And my question is different.

11 A. Okay.

12 Q. My question was: You can't tell us for any of
13 the concentrations that you pointed to whether that
14 specific concentration came from this site or from
15 anywhere else, can you?

16 A. I agree with that.

17 MR. GIUGLIANO: Can you please, Jen, pull
18 up PX-142d.

19 Q. Sir, I'm directing you to your charts on the
20 flood.

21 A. Sure.

22 Q. And this is where you showed specific flooding
23 events over that time period, correct?

24 A. Yes.

25 MR. GIUGLIANO: Can you please zoom in

1 on -- right at the 2004-2008 time frame.

2 Q. Sir, we've heard evidence already that -- and I
3 know you said before you're not familiar with when the
4 parties became involved. But we've heard evidence from
5 Dr. Pardue already that Waste Management was merged --
6 acquired the stock in MIMC right on New Year's Eve
7 heading into 2004. That's why I'm narrowing it, okay?

8 A. Okay. Uh-huh.

9 Q. So according to your chart, there were two
10 flood events from the time that Waste Management
11 acquired the stock of MIMC, right around 12/31/03 going
12 to March of '08; is that correct, just those two there?

13 A. I would agree with that, the two, yes.

14 Q. Forgive me. I'm trying to skip some questions
15 for you.

16 Ms. Gray, who just asked you some questions
17 on behalf of MIMC, talked to you about the scouring
18 velocity of a flood.

19 A. Yes.

20 Q. Am I correct, you haven't measured what speed
21 the water would have to go to break up particles of the
22 waste?

23 A. I have not, no.

24 Q. So you don't know how resistant the waste is to
25 erosion from flood waves going by, correct?

1 A. That's correct.

2 Q. The same thing, you don't know how resistant
3 that waste is to wind erosion, correct?

4 A. I do not.

5 Q. And you don't -- you can't tell us any
6 specifics about any scouring of the waste that actually
7 occurred on a given day; is that correct?

8 A. That's correct.

9 Q. I believe you testified, sir, that you're
10 relying on Dr. Pardue to -- with regard to his expertise
11 with regard to the colloids, the tiny particles,
12 correct?

13 A. Absolutely, I am, yes.

14 Q. And you, sir, have not calculated the number of
15 colloids that were ever transferred on any day from
16 inside the impoundment to outside, correct?

17 A. I have not computed that, no.

18 Q. And you -- and, likewise, you haven't
19 calculated for any day whether any dioxin actually was
20 transferred in the water from inside the impoundment to
21 outside, correct?

22 A. I have not computed on any particular day.

23 Q. Correct.

24 A. I have just offered opinions that I think that
25 there are mechanisms there to allow that to happen.

1 Q. Right. You think there are mechanisms there
2 that allow it to happen, but you can't say any amount
3 that actually came out on a given day, correct?

4 A. Not the amount, no.

5 Q. And that is with respect to any mechanism
6 you've discussed? You can't tell us whether on a given
7 day any amount left on that day, correct?

8 A. Not the specific amount, correct.

9 Q. Mr. Schrader asked you a few questions about
10 dredging, sir.

11 A. Yes.

12 Q. And I would like to turn to that, briefly.
13 You'd agree, would you not, that dredging could
14 absolutely be a transport mechanism for the dioxin to
15 get out of the impoundment, correct?

16 A. It could.

17 Q. Okay. You're not offering any opinion here in
18 this case about dredging, though, correct?

19 A. That's right.

20 Q. And I believe you've testified previously that
21 you've done nothing at all to analyze whether, in fact,
22 any dioxin that you see in the samples was the result of
23 dredging, correct?

24 A. That's correct.

25 Q. Certainly it could have been the result of

1 dredging, correct?

2 A. Oh, yes, some contribution from the dredging
3 could have occurred, yes.

4 Q. Well, you haven't analyzed whether the amount
5 of dioxin that's around the site that you believe came
6 from the site was as a result entirely of dredging or
7 from any of the other mechanisms, correct?

8 A. I have never broken out specifically what came
9 out of, if you will, any specific mechanism.

10 Q. Correct. So you can't tell us here today
11 whether the amount of -- whether any detection of dioxin
12 was solely the result of dredging?

13 A. Correct.

14 Q. You can't deny that, correct?

15 A. That's correct.

16 Q. Yesterday you testified that what you were
17 asked to do was to consider the potential ways that
18 dioxin could have been released from the site, right?

19 A. Yes.

20 Q. And when you were hired back in February of
21 2013 to serve as an expert for Harris County, you had
22 some initial meetings with the attorneys for Harris
23 County, correct?

24 A. I did.

25 Q. With Mr. Wotring, correct?

1 A. Yes.

2 Q. Mr. Owens from Harris County, right?

3 A. Yes, yes.

4 Q. And I believe you described shortly after your
5 initial meetings that, quote, "Documents started to show
6 up," right?

7 A. Yes.

8 Q. And those were documents provided to you from
9 Harris County, correct?

10 A. They were; from these attorneys, yes.

11 Q. From Mr. Wotring. Did you get some from
12 Mr. Owens?

13 A. Mostly through Mr. Wotring's law firm, yes.

14 Q. Okay. None of the documents they provided to
15 you had anything to do with dredging, correct?

16 A. That's correct.

17 Q. And after you got those documents, you actually
18 took a boat trip out on the river to look at the site;
19 did you not?

20 A. I did. You know my history well. Yes, I did.

21 Q. I may have read one or two things about you.

22 A. Okay.

23 Q. And Mr. Owens, from the County, was with you on
24 the boat trip, correct?

25 A. He was.

1 Q. And at no point during that boating trip did
2 Mr. Owens mention to you that back in 2009, he had
3 indicated in writing that he was concerned because he
4 had reviewed photos from back in the '70s and he was
5 concerned that there had been dredging directly into the
6 cells of the site; is that correct?

7 A. That's correct.

8 Q. So you didn't know -- and shortly after that
9 boat trip in May, you drafted your expert opinions for
10 this case, put it down in writing, right?

11 A. I did.

12 Q. And that's the one that contains no mention of
13 dredging as a potential source, correct?

14 A. That's correct.

15 Q. Okay. Something you would have liked to have
16 known at that point, would you agree with me, that
17 Mr. Owens believed that there had been dredging directly
18 in the impoundment in the past? Would you agree?

19 A. I can't really answer that question whether I
20 would have liked to have known that or not. I don't
21 think the presence or absence of the dredging alters the
22 mechanisms and the opinions that I have already
23 provided.

24 Q. Well, it's another mechanism, right?

25 A. It's another mechanism, but I provided four or

1 five other major mechanisms that I think --

2 Q. Right. It's another mechanism that you can't
3 rule out as being the sole source of any dioxin in the
4 river, correct?

5 A. I've not analyzed anything to do with dredging.

6 Q. Right. So you can't rule it out as being the
7 sole source of dioxin in the river; isn't that right?

8 A. As being the sole source?

9 Q. Yeah. You can't rule out -- you haven't
10 studied it?

11 A. I've evaluated, based upon a very detailed
12 study of the site, with all of the other physical
13 mechanisms that are going on out there with respect to
14 floods, with respect to the movement of the river, with
15 respect to the direct connection through the breach; and
16 all of those mechanisms certainly contribute to dioxin
17 transport.

18 Q. And, sir -- and I appreciate that, but that
19 wasn't my question. My question is directed at
20 dredging.

21 You cannot rule out dredging as the sole
22 source of dioxin in the river, correct, because you
23 didn't study it; isn't that right?

24 A. Oh, I don't think I need to go and do a
25 detailed study to answer that question. I don't believe

1 that dredging was the sole source in this river, not the
2 sole source. That's the way you've asked the question.

3 Q. And you've come to that conclusion without
4 studying dredging at all, correct?

5 A. By studying all these other mechanisms.

6 Q. And my question is different, again, sir,
7 respectfully. You came to that conclusion without
8 studying anything about dredging, correct?

9 A. That is correct.

10 Q. Thank you.

11 MR. GIUGLIANO: Can you pull up, please,
12 DX-75, sir?

13 Q. We heard testimony -- were you here the other
14 day when Captain Ruiz from the Texas Parks & Wildlife
15 testified?

16 A. No, I was not.

17 Q. This is an internal document between employees
18 of Texas Parks & Wildlife.

19 MR. GIUGLIANO: Jen, can you please blow up
20 the e-mail, the thicker e-mail from the bottom? I'm
21 looking at that paragraph, the main paragraph there.

22 Q. This is an e-mail dated April 1, 2005. Do you
23 see that?

24 A. Yes.

25 Q. Okay. And I'd like to focus you in on the

1 paragraph that starts with "In looking."

2 MR. GIUGLIANO: Can you zero in on that
3 one, Jen?

4 Q. So this is the internal Parks & Wildlife e-mail
5 in 2005, and it says, "In looking over the more recent
6 data, I believe more firmly that the recent sand mining
7 was responsible for the increase in dioxin levels at the
8 site noted between 1994 and 2002."

9 A. I see that.

10 Q. You see that?

11 A. Yes.

12 Q. Were you provided with this document at any
13 point in time before you reached any conclusions about
14 the sources or ways that dioxin got out of the
15 impoundments, sir?

16 A. No.

17 Q. Have you reviewed Dr. Johns' report? He's a
18 defense expert.

19 A. I have.

20 Q. And you're familiar with -- I believe you told
21 Mr. Schrader a bit before that you had no idea and seen
22 no evidence of any mining and an operation where they
23 dredged into the impoundment, brought it across the
24 waterway, and deposited it on that sand just to the
25 west; is that correct?

1 A. That's correct.

2 Q. Do you know that Dr. Johns references that
3 entire --

4 A. Yes.

5 Q. -- issue in this report, correct?

6 A. I've seen it.

7 Q. You've seen that. And you know that he bases
8 that opinion on the fact that he reviewed -- that some
9 of the consultant's data that actually went in and
10 tracked the dioxin being pulled out and found it
11 deposited on the other embankment, correct?

12 A. Yeah. I haven't studied that in detail, but I
13 have seen it.

14 Q. You understand that there is data information
15 out there showing that, right?

16 A. Yes.

17 Q. And if it's deposited on that bank just to the
18 west of the site, the flow of the river could then spurn
19 it up, churn it up and move it down the river, correct?

20 A. It could, yes.

21 MR. GIUGLIANO: Thank you, Dr. Bedient. I
22 have no further questions.

23 THE WITNESS: Thank you.

24 THE COURT: Mr. Wotring.

25 MR. WOTRING: Yes, I've got a few.

1 If we could pull up Exhibit No. 1005.

2 REDIRECT EXAMINATION

3 QUESTIONS BY MR. WOTRING:

4 Q. Doctor, are you familiar with this? I think
5 you talked about it in your examination.

6 A. Yes.

7 Q. That's the survey report for the impoundments?

8 A. Yes.

9 MR. WOTRING: Can we pull up Exhibit
10 No. 31, which should be the site map?

11 Q. And you've seen Exhibit No. 31 before, the
12 pictures of the impoundments?

13 A. I have.

14 Q. Do you have an opinion, comparing the picture
15 of the impoundments on your left in Exhibit No. 31 with
16 the survey and your review of the survey, whether
17 portions of all three of the impoundments are
18 underwater, as reflected in Exhibit No. 1005? Do you
19 want me to break that down?

20 A. Yeah, you are going to have to reask that
21 question. That went right on by me.

22 Q. You got the laser pointer?

23 A. I do.

24 Q. All right. Let's point to the pit on the
25 western -- eastern side. Let's start with the eastern

1 side. And -- all right. Is that --

2 MS. GRAY: Objection, Your Honor, with
3 regard to lack of foundation of the qualifications of
4 Dr. Bedient to make this analysis from the stand with
5 regard to what portions of the pit, based upon the
6 surveyor, are underwater.

7 THE COURT: Can y'all approach just
8 briefly?

9 (After a bench discussion outside the
10 hearing of the reporter and jury, the following
11 proceedings were had:)

12 THE COURT: Let's take a quick break.
13 We're going to try to finish with Dr. Bedient before
14 lunch. So if y'all will step out for just a few
15 minutes.

16 You may step down, too, Doctor.

17 (Whereupon, the jury left the courtroom and
18 the following proceedings were had:)

19 THE COURT: Please be seated. I should
20 probably ask Dr. Bedient to step out. Thank you, sir.

21 THE WITNESS: Sure.

22 (Whereupon, the witness left the courtroom)

23 THE COURT: Just so we weren't all
24 whispering at the bench, and I know you want to be
25 specific about your objection, Ms. Gray, let me let you

1 state that again.

2 MS. GRAY: Your Honor, regardless of
3 whether there is previous testimony with regard to how
4 inundated the impoundment was at any particular period
5 of time, Dr. Pardue is not a survey expert -- or
6 Dr. Bedient, excuse me, thank you, is not an expert in
7 surveying and cannot -- and there is no foundation that
8 qualifies him to compare that picture to what is
9 depicted on the survey, to testify that the survey
10 reflects that all three of the areas are -- were
11 inundated.

12 THE COURT: As opposed to the picture?

13 MS. GRAY: Yes.

14 THE COURT: As opposed to saying the
15 picture shows X, Y or Z?

16 MS. GRAY: That's correct. It's the
17 connection of the two that I believe is improper.

18 THE COURT: And the reference to,
19 therefore, the survey shows this?

20 MS. GRAY: Yes.

21 MR. WOTRING: Well, I think he has
22 testified that he's familiar with the survey, he's
23 familiar with the aerial photographs. Given the rest of
24 his testimony, I don't think there is any question that
25 he has the foundation to answer the question I just

1 asked him.

2 I can ask him a different question in a
3 different way to establish that each one of the three
4 pits -- the two pits on the eastern side and portions of
5 the western pit were submerged after the survey date. I
6 can go at it in a different direction.

7 THE COURT: Okay. But are you -- is he
8 basing that opinion on the aerial photograph or is he
9 somehow saying, "I have looked at the picture and if you
10 look at the survey, I can match the survey to the
11 picture," which is what I think she's objecting to.

12 MR. WOTRING: I think he can do both.
13 He's -- he is -- he has testified extensively about the
14 survey. They went into it on cross by asking him a
15 legal question about whether it's one facility. So I
16 want to clear that up, that he's not offering the
17 opinion about the legal definition of a facility for the
18 purposes of their use later on.

19 And now I want to answer the question that
20 they have raised in their cross-examination about when
21 he says the impoundments were submerged, in his direct,
22 what did he mean and to clarify that issue.

23 MS. GRAY: Your Honor, I don't believe --
24 and I know that I can stand to be corrected -- that
25 there is any testimony where Dr. Bedient says, "I rely

1 on this survey to support my opinion that all three of
2 the pits were inundated, submerged, underwater." He's
3 relied upon it with regard to where is the mean high
4 tide line; but to then, from the stand, where there has
5 been no previous testimony, have him compare the
6 picture, which has no scale on it, to the survey we
7 believe is inappropriate and there is no foundation to
8 allow him to do that, to say that the survey supports
9 that all three of the areas that are under discussion
10 were submerged by that date.

11 THE COURT: So then the question is --
12 thank you, Ms. Gray -- whether or not Dr. Bedient has
13 done that before. Obviously he's talked about the
14 aerial photographs, no question about that; and he has
15 talked about the survey as the survey. The question is
16 has he said before -- testified before that "The survey
17 matches what I'm seeing on the picture to show that
18 these three pits were all inundated." That's the
19 objection, as I understand it.

20 MR. WOTRING: I don't understand --

21 THE COURT: Or has he just said, which I
22 think they are arguing that they said, that here is what
23 the aerial photograph shows me and the survey shows that
24 parts of the impoundment were submerged?

25 MR. WOTRING: He has said, I think in the

1 motion to strike portion, that all three areas of all
2 three of the impoundments were submerged and that he did
3 that based upon the survey, I think is how it went in
4 his -- in his motion to strike. But, again, that's
5 hundreds of pages of testimony ago.

6 THE COURT: Right. I can't remember
7 whether it was Dr. Bedient or Dr. Pardue, in all
8 fairness, who talked about part of the western
9 impoundment being submerged and I don't remember who
10 that was.

11 MR. WOTRING: The Court's memory may be
12 better than mine, but I thought it was Dr. Bedient who
13 addressed that issue.

14 Frankly, if the objection is lack of
15 foundation, I'll put him on the stand and ask him about
16 his experience with surveys and his work with surveys
17 and his knowledge of this area, and then ask him the
18 question about whether this survey reflects portions of
19 all three of the pits being submerged or inundated.

20 THE COURT: Okay. That's a different
21 question than the one Ms. Gray is objecting to.

22 MS. GRAY: And, Your Honor, we would
23 maintain that that's a new opinion that he has not yet
24 offered. He shouldn't be allowed to do it from the
25 stand. That would be highly prejudicial.

1 THE COURT: Did Dr. Bedient testify before
2 that portions of the other pits were inundated? I mean,
3 he certainly talked about the -- is it 2 and 3, the
4 little one and the bigger one? The question is, did he
5 talk about one?

6 MS. GRAY: I, too, would have to search all
7 of the transcripts to definitively state that, Your
8 Honor; but I don't recall, that much I can say.

9 THE COURT: I don't remember if it was
10 Dr. Bedient or Dr. Pardue.

11 MR. GIUGLIANO: Your Honor, Dr. Bedient, on
12 9/5 in the *Daubert* said he can't tell us which days, if
13 any, the western impoundment is submerged at all.

14 THE COURT: Okay. So then it must have
15 been Dr. Pardue.

16 MR. WOTRING: I'm not willing to agree with
17 counsel's limited statement for the record. He's
18 clearly testified in this case that the pits were
19 submerged.

20 THE COURT: He has. But like I said, what
21 I can't remember is there was definitely colloquy in the
22 hearing on the motion to strike about exactly what was
23 submerged; and so to the extent -- and I'm going to -- I
24 think the only fair thing to do at this point is to give
25 you a break so you can find it. To the extent that he

1 previously testified that he can't say any part of the
2 western impoundment was submerged, then I think it would
3 be problematic to link the survey with the picture today
4 and say the survey shows the western impoundment was
5 submerged.

6 But I don't know that because I don't
7 remember specifically what he said. I knew it was one
8 of them. I know there was some issue about the western
9 impoundment because there was a distinction between the
10 western impoundment -- I mean the western pit, excuse
11 me, and the eastern.

12 MR. MUIR: Your Honor?

13 THE COURT: I don't want to put you on the
14 spot.

15 MR. MUIR: Volume 1, Page 58: "And is it
16 your testimony that by 1987 all three of these pits were
17 submerged, either submerged or partially submerged?"

18 THE COURT: Right. I don't think the
19 question is whether or not he said that from pictures
20 and -- I mean, he gave that global opinion. The
21 question is, did he use the survey to support that, is
22 really the question. That's what they're objecting to.
23 They're not objecting to him saying, "And I think the
24 picture supports my opinion that they were all
25 submerged." I think what they're objecting to is him

1 using the survey to show that they were all submerged.

2 MS. GRAY: And, Your Honor, we have found a
3 reference and he does make reference to the Shine
4 Report, I apologize; but it's only a portion of the
5 western impoundment.

6 THE COURT: I thought that was Dr. Bedient.
7 Okay. So, then, the objection would be overruled.

8 MR. WOTRING: Thank you, Your Honor.
9 Do you want to break for lunch?

10 THE COURT: We can go off the record.

11 (Whereupon, after a discussion off the
12 record, the following proceedings were had:)

13 THE COURT: We'll go ahead and break now.

14 (After a break, the jury was present and
15 the following proceedings were had:)

16 THE COURT: Please be seated.

17 You may proceed.

18 MR. WOTRING: Thank you, Your Honor.

19 CONTINUED REDIRECT EXAMINATION

20 QUESTIONS BY MR. WOTRING:

21 Q. Dr. Bedient, when we broke for lunch, I think
22 we were looking at the survey?

23 A. Yes.

24 Q. And based upon your review of the survey, do
25 you remember that there is some attached aerial

1 photographs with it?

2 A. Yes, I do.

3 Q. Okay. And you've reviewed the aerial
4 photographs and the survey together?

5 A. I did.

6 Q. And based upon that and the other information
7 you've looked at in this case, do you have an opinion
8 about whether, as of the date of this survey, portions
9 of the eastern two impoundments were submerged
10 underwater?

11 A. I do.

12 Q. And what is that opinion?

13 A. They were submerged underwater.

14 Q. And do you have an opinion, based upon that
15 same information, about whether a portion of the western
16 impoundment was submerged underwater at that time?

17 A. I do.

18 Q. And what is that opinion?

19 A. It was -- a portion was submerged.

20 Q. You talked about and you reviewed this area and
21 the impoundments as being one facility. Do you remember
22 that question?

23 A. Yes.

24 Q. You're not making a legal determination about
25 what one facility means, are you?

1 A. No, I'm not.

2 Q. Just a couple other questions to clear up
3 something. I believe you talked about subsidence in
4 your report. Do you remember that?

5 A. I did.

6 Q. And the subsidence, was it uniform from 1906
7 through 1973 or 1978?

8 A. No. It was largely, I think, centered on the
9 later years.

10 Q. And in terms of the amount of subsidence from
11 1906 to 1978, in the area we were talking about, was it
12 in the nature of 6 feet?

13 A. I believe so.

14 Q. And from approximately 1973 through 2000, was
15 the subsidence in the area in the nature of a half a
16 foot?

17 A. Yes, that's what I reported in my report.

18 Q. Now, you were asked some questions about
19 whether you could make a determination on any particular
20 day. Do you remember those questions?

21 A. Oh, yes.

22 Q. Okay. To some, based upon the information you
23 have reviewed in this matter, the aerial photographs and
24 the survey and the other information, do you have an
25 opinion, based upon reasonable scientific certainty,

1 about whether there was water in communication with the
2 pits every day from February 15th, 1973 through March
3 30th of 2008?

4 A. I do have an opinion on that.

5 Q. And what is that opinion?

6 A. My opinion still stands, as it always has been,
7 that the evidence, the aerial photos, the proximity to
8 the river, all of the things I've reviewed, all of the
9 documents. My finding is that within reasonable
10 scientific probability, there was transport each and
11 every day.

12 Q. Okay. And you heard Dr. Pardue's opinion about
13 if there was water in connection with the surface of the
14 impoundments, there would be dioxin being released every
15 day?

16 A. Yes.

17 Q. And although --

18 MR. WOTRING: That's all the questions I
19 have, Dr. Bedient. Thank you.

20 THE WITNESS: Thank you.

21 THE COURT: Thank you.

22 Mr. Schrader.

23 MR. SCHRADER: Very quickly.

24 RE CROSS-EXAMINATION

25 QUESTIONS BY MR. SCHRADER:

1 Q. I'm almost done.

2 A. I've heard that before.

3 Q. So, Dr. Bedient, you testified in response to
4 questions from counsel about the level of inundation in
5 the impoundment area after 1989. Do you recall that?

6 A. Yes.

7 Q. You're not saying, are you, Dr. Bedient, that
8 the western section of the impoundment was inundated
9 every day after 1989, are you?

10 A. No.

11 Q. In fact, we know there are plenty of
12 photographs that show the western section of the
13 impoundment was not inundated after that date, right?

14 A. You're correct.

15 MR. SCHRADER: Thank you very much, sir.

16 THE COURT: Ms. Gray?

17 MS. GRAY: No questions, Your Honor.

18 THE COURT: Mr. Giugliano?

19 MR. GIUGLIANO: No further questions.

20 MR. WOTRING: I do have one follow-up.

21 THE COURT: Yes, sir.

22 FURTHER REDIRECT EXAMINATION

23 QUESTIONS BY MR. WOTRING:

24 Q. Your opinion is not that the entirety of the
25 western impoundment was submerged every day after

1 July 1, 1982, right?

2 A. Correct.

3 Q. A portion of it was within the area that was
4 inundated, as reflected in the survey?

5 A. Based upon the survey, yes.

6 MR. WOTRING: Thank you.

7 THE COURT: Anything further, Ms. Gray?

8 MS. GRAY: No, Your Honor.

9 MR. GIUGLIANO: No, Your Honor.

10 THE COURT: Thank you, Dr. Bedient. You
11 may step down, sir.

12 Counsel, approach just briefly.

13 (After a bench discussion outside the
14 hearing of the reporter and jury, the following
15 proceedings were had:)

16 THE COURT: Ladies and gentlemen, we're
17 going to go ahead and break. We can go off the record.

18 (Whereupon, the jury left the courtroom and
19 the following proceedings were had:)

20 THE COURT: Please be seated.

21 MR. WOTRING: I need to do a brief Offer of
22 Proof with Dr. Bedient.

23 THE COURT: Sir, if you'll take the stand
24 again.

25 Mr. Wotring.

1 MR. WOTRING: Outside the presence of the
2 jury, I wanted to proffer an Offer of Proof for
3 Dr. Bedient and some opinions that were excluded in this
4 matter.

5 PHILIP BEDIENT, Ph.D.

6 having been previously sworn, testified as follows
7 outside the presence of the jury:

8 OFFER OF PROOF

9 QUESTIONS BY MR. WOTRING:

10 Q. Dr. Bedient, you've reviewed the information I
11 think you've already testified about on direct about the
12 pits and the impoundments in this case; and you have
13 opinions for the period of time from 1967 through 1973
14 about whether there was ongoing daily releases of or
15 communications of water from the impoundments to
16 outside; is that correct?

17 A. Yes.

18 Q. Would you briefly describe those opinions?

19 A. You're talking about for the entire period?

20 Q. For the entire period and focusing upon from
21 '67 to '73.

22 A. The earlier period was primarily a period of
23 seepage, as described in my report, and it was a period
24 involving the passage, if you will, of contaminants
25 through the levees themselves into the river.

1 Q. And as described in your report, do you have an
2 opinion, based upon reasonable scientific certainty,
3 about whether there would have been seepage through the
4 impoundments every day from September 1st, 1967, through
5 February 14th of 1973?

6 A. I do.

7 Q. And what is that opinion?

8 A. As long as the water level within the pits is
9 greater than the water level outside, then there would
10 be transport outside, toward the river.

11 Q. You have previously discussed, now being
12 outside the presence of the jury, you've previously
13 discussed your use of the US Geological data with regard
14 to the Highway 90 bridge, correct?

15 A. Yes.

16 Q. And briefly describe your opinions about
17 whether there would have been -- about how that data
18 applies to the impoundments starting on February 15th of
19 1973.

20 A. That data from that gauge was used from an
21 analysis of that data over some approximately 13,000
22 days. That data was used to indicate that most times
23 the river was under tidal influence, high tides and low
24 tides each day, and then during certain time periods, of
25 course, there were floods, and those are so noted from

1 that same gauge.

2 Q. And does that support any opinions that there
3 was releases of water containing dioxin from inside the
4 impoundments -- does that information support your
5 opinions that there was releases of information --
6 releases of water containing dioxin from inside the
7 impoundments to outside the impoundments during that
8 period of time?

9 A. Yes.

10 Q. And briefly explain how it supports that
11 opinion.

12 A. Essentially, on those low flow days, the tidal
13 action would act to come in, flow into the pits, elevate
14 the pit level, and then as the tide would recede each
15 day, the pit would drain out and dioxin and colloidal
16 form in the water column would move out as well through
17 the breach.

18 MR. WOTRING: Your Honor, to finalize the
19 Offer of Proof for Dr. Bedient, I'd ask that I mark a
20 copy of his report, which contains these opinions in
21 summary form, as Plaintiffs' Exhibit No. 1 for the Offer
22 of Proof, October 23rd of 2014. At this time we ask to
23 be permitted to introduce that testimony to the jury.

24 THE COURT: All right. With regard to the
25 exhibit, just so that we're consistent for our record,

1 do you want the three different Offers of Proof to be
2 Offer of Proof Exhibit 1 and then the date; or do you
3 want them to be Offer of Proof Exhibit 1, Exhibit 2,
4 then which would make this Offer of Proof Exhibit 3? It
5 doesn't matter to me, but we have muddled them a little
6 bit and I want to make sure your record is clear.

7 (Whereupon, after a discussion off the
8 record, the following proceedings were had:)

9 THE COURT: So with -- back on the record.
10 With respect to this Offer of Proof, you
11 are offering Dr. Bedient's report as Offer of Proof
12 Dr. Bedient No. 1.

13 MR. WOTRING: No. 1 Your Honor, that's
14 correct.

15 THE COURT: That report is admitted as
16 Bedient No. 1 for the Offer of Proof. Do the defendants
17 want to respond?

18 MR. CARTER: No, Your Honor.

19 MR. SCHRADER: Other than reference and
20 adopt by reference the arguments that were previously
21 made, both in writing and in connection with the
22 *Robinson* hearing that the Court held, we have no further
23 response.

24 MR. GIUGLIANO: And, Your Honor, just to
25 know, there will be no waiver on it from an evidentiary

1 standpoint, as far as hearsay.

2 MS. GRAY: Absolutely. The fact that the
3 opinions are in the report doesn't go to the truth of
4 the matters asserted therein.

5 THE COURT: Understood.

6 MS. GRAY: For the record.

7 THE COURT: I don't think anyone is
8 suggesting the report -- even if I were to change my
9 opinion, that the report would go back to the jury. I
10 think Mr. Wotring is just offering it to support his
11 Offer of Proof.

12 I think I need to separate out the ruling,
13 so it's clear. The ruling with regard to the seepage
14 opinions from 1967 to 1973 were the subject of the
15 original Motion to Exclude, which I've ruled on and
16 excluded those opinions, and that ruling stands.

17 The other opinion with regard to the
18 Highway 90 gauge and tidal influences was the subject of
19 a Motion to Strike New Opinions, and I ruled on that,
20 and that ruling stands.

21 So the request is denied, or the objection
22 to the Court not admitting that information is
23 overruled, however is best for the record; and with that
24 I think you're concluded, Dr. Bedient. Thank you.

25 THE WITNESS: You are sure?

1 THE COURT: I do think we are right now.

2 MR. WOTRING: Can I put one more matter on
3 the record outside the presence of the jury?

4 THE COURT: Do you need Dr. Bedient?

5 MR. WOTRING: I do not. I noted in
6 reviewing my direct examination of Dr. Pardue that at
7 one point I am wrestling with my oversized board of the
8 survey and on the record it says "This is not going to
9 work." I meant by that, and I don't think this is on
10 the record, that my wrestling with the survey board was
11 not going to work and nothing about that comment should
12 be taken to mean that I thought Dr. Pardue's opinions
13 were not going to work.

14 THE COURT: That's the joy of the flat
15 reading of a record. You have clarified that --

16 MR. WOTRING: Thank you, Your Honor.

17 THE COURT: -- for the record. Anything
18 else that we need to put on the record with regard to
19 this?

20 MR. WOTRING: No, Your Honor.

21 THE COURT: Do we want to go off the record
22 for a second and regroup with regard to the excerpts and
23 who do we want to handle first?

24 We're off the record.

25 (Whereupon, after a discussion off the

1 record, the following proceedings were had:)

2 THE COURT: We are on the record.

3 Ms. Ballesteros.

4 MS. BALLESTEROS: Thank you, Your Honor.

5 Defendant Exhibit 769 has already been
6 pre-admitted, but in order to comport with the Court's
7 limines, we have agreed to two redactions on the first
8 page of the document.

9 The first redaction -- Earnest, do you want
10 me to read it in the record so it's clear?

11 MR. WOTRING: Yes.

12 MS. BALLESTEROS: It's the first paragraph
13 in 1.01. At the end, we're redacting, "The lawsuit
14 concerns releases and threatened releases of hazardous
15 substances, including a highly toxic form of dioxin into
16 the San Jacinto River from waste pits in violation of
17 the Texas Water Code, Health & Safety Code, and any
18 other applicable common law or statutory causes of
19 action, including, but not limited to environmental
20 statutes, rules and regulations including those laws
21 that preceded the statutes."

22 And then the second redaction is in
23 Paragraph 1.03. It starts kind of midway, and it starts
24 out with the sentence, "... or any components or
25 degradation products thereof, other hazardous

1 substances, hazardous wastes, pollutants, contaminants,
2 industrial solid wastes, or other solid or liquid wastes
3 or chemical discharges ('Hazardous Substances') in,
4 around, emanating from or concerning the San Jacinto
5 River Superfund Site and waste pits located in Harris
6 County, Texas ('the Representation')."

7 MR. WOTRING: Harris County agrees that
8 those are probably within the scope of this Court's
9 previous ruling and that we can redact those for the
10 purposes of displaying them to the jury; but I do think
11 I need to have a complete copy of that in the record
12 somewhere, of the nature of the other legal challenges
13 that have been raised.

14 THE COURT: So are you saying you would
15 like to have the complete document in the record as a
16 "Court only" exhibit?

17 MR. WOTRING: That's correct.

18 THE COURT: Okay.

19 MR. WOTRING: That just dawned on me. And
20 the other point, I think, I don't -- if the scope of the
21 representation becomes an issue on the stand tomorrow,
22 then we might have to approach about this redaction; but
23 I don't think that's going to be a problem.

24 THE COURT: So are you-all okay with
25 Mr. Wotring admitting the complete 279 for the Court

1 only?

2 MS. BALLESTEROS: We are.

3 THE COURT: 279 unredacted is admitted for
4 the Court only, and the 279 that has been previously
5 admitted is now up to date with the redactions. And
6 I've marked that on the list.

7 (Whereupon, after a discussion off the
8 record, the following proceedings were had:)

9 THE COURT: Let's go back on the record.

10 Just to clarify, 769 was previously
11 admitted. It has now been redacted, by agreement.
12 However, Mr. Wotring also would like to admit
13 Defendants' Exhibit 769 in its entirety, unredacted, as
14 a Court exhibit only. And I understand Ms. Ballesteros
15 agrees with that.

16 MS. BALLESTEROS: Correct, Your Honor.

17 THE COURT: So 769 -- Defendants' 769 is
18 admitted to the Court only, unredacted.

19 (Whereupon, after a discussion off the
20 record, the following proceedings were had:)

21 THE COURT: So to sum up, 769 unredacted
22 replaces 269 unredacted as a Court exhibit.

23 MR. STANFIELD: Is it a separate exhibit?

24 (Whereupon, after a discussion off the
25 record, the following proceedings were had:)

1 THE COURT: We're going to start over.

2 We are back on the record. And the parties
3 had been discussing, off the record, redactions to
4 Defendants' Exhibit 769. They have now agreed to
5 certain redactions, which Ms. Ballesteros just read into
6 the record. So, therefore, the redacted 769 replaces
7 previous Defendants' 769.

8 In addition, Mr. Wotring made a request the
9 unredacted 769 be admitted to the Court only as a Court
10 exhibit, and Ms. Ballesteros agreed with that request,
11 right?

12 MS. BALLESTEROS: Correct, Your Honor.

13 THE COURT: Therefore, unredacted 769 is
14 admitted to the Court only. And the entire discussion
15 that all of us had on the record with regard to 269
16 should be ignored and stricken, if we could, from the
17 record and has nothing to do with the witness who is
18 coming on next or any discussion about redacted or Court
19 exhibits, period.

20 MR. WOTRING: As I understand it, no party
21 has sought the admission of redacted/unredacted
22 Exhibit 269, defendants or -- Defendants' 269.

23 THE COURT: Correct.

24 MS. BALLESTEROS: Your Honor, the only
25 other issue we have is defendants would like to

1 pre-admit Defendants' Exhibit 767. These are redacted
2 time sheets that were produced, and I believe there was
3 no objection.

4 MR. WOTRING: Those were the redacted time
5 sheets that were produced at the deposition, and Harris
6 County has no objection to the admission of those
7 invoices.

8 THE COURT: All right. Defendants' 767 is
9 admitted, as redacted.

10 MS. BALLESTEROS: Your Honor, may I be
11 excused?

12 THE COURT: Yes. Thank you.

13 (Ms. Ballesteros left the courtroom)

14 THE COURT: So who do we want to begin
15 with?

16 MR. WOTRING: Tab 1, I think, is --

17 THE COURT: Mr. Dukert.

18 MR. WOTRING: -- Mr. Dukert.

19 MR. STANFIELD: No. 1. So my --

20 THE COURT: Wait a minute. Am I still
21 looking at -- this is in the big notebook that has
22 objections?

23 MR. STANFIELD: Yes, Your Honor; but I'll
24 go through them orally, the ones I care about.

25 THE COURT: All right.

1 MR. STANFIELD: So, Your Honor, starting on
2 Page 16, Line 17 through Line 25, I would just object to
3 that as irrelevant. He's being shown a photograph,
4 which is in evidence, and states that he doesn't recall
5 ever looking at that particular view of the site. For
6 reference, it's the aerial photograph that has the red
7 outlining on it; and so I don't think that's necessary
8 with this witness.

9 MR. WOTRING: I think -- the response is I
10 think that is the setup for when I later ask him to
11 define "site" for the purposes of the deposition.

12 MR. STANFIELD: I just don't want it to be
13 misleading to the jury that -- I mean, he says he's
14 never seen it before; and so we don't want the
15 impression left with the jury that Mr. Dukert, a
16 corporate representative, necessarily agrees that there
17 are three separate pits at issue, et cetera, that are
18 depicted through the outline.

19 THE COURT: Why is the setup necessary?
20 Can you tell me where the question is?

21 MR. WOTRING: I can't. If it comes up
22 later on, I'll reference it to the Court. We can take
23 out 16, Lines 17 through 25.

24 THE COURT: Yes.

25 MR. STANFIELD: Okay.

1 Your Honor, on the next page, 17, Line 20
2 through 18, Line 22, frankly, I'm doing this in part as
3 a courtesy to my brethren here at the table who
4 represent MIMC. But he was asked a question as to our
5 corporate understanding as to who owns the site. And I
6 think he got jumbled up and he said that he thought that
7 McGinnis Industrial Maintenance Corporation owns the
8 site. He clarified on Page 184, Lines 11 through 14,
9 that, in fact -- this is what he says on 184, Lines 11
10 through 14. He says: "Just to clarify, in my review of
11 the documents in preparation for this deposition, I
12 don't recall seeing any specific documents that
13 identified ownership of the land, the pits, the site."

14 And so it's a legal issue that you've
15 already ruled on. It's now irrelevant as to what we
16 thought, and he clarified that he really, frankly, did
17 not know and mis-answered in that section.

18 THE COURT: Mr. Wotring.

19 MR. WOTRING: The -- the issue is -- first
20 of all, it was within the scope of the topics he was
21 designated to give a deposition about; and who Champion
22 thought owned the site is relevant to the issues in this
23 lawsuit about the -- their understanding about control
24 over the site, their understanding about their
25 contractors' access to the site, and their understanding

1 about other issues that MIMC had and the rights that
2 MIMC had with respect to the site.

3 We also point out that if International
4 Paper or Champion was mistaken about who owns the site,
5 that would also be relevant for the jury's consideration
6 in terms of the level of care, due diligence that
7 Champion placed in the operations between MIMC and
8 itself.

9 I appreciate they clarified it later on.
10 Several hours later, after the deposition it was
11 clarified, but this is the -- this is what he answered
12 in response to my question. There is no objection, and
13 the jury should consider this excerpt.

14 MR. STANFIELD: Your Honor, if that is
15 going to be the case, and I know you haven't ruled just
16 quite yet, so I am standing on my objection, if that
17 were to be the case, at minimum an optional completeness
18 is necessary on Page 184, Lines 4 through 9, and Lines
19 11 through 14 of 184, where Mr. Hutcheson asked the
20 follow-up clarifying question.

21 THE COURT: To me, the way to handle this
22 one is the question isn't just about ownership, it's
23 about the ownership and operation of the site; and it
24 seems to me -- and I'm not suggesting exactly how you do
25 it -- but it seems to me you could chop up this question

1 and answer to simply reflect his answer about operation
2 and control and not about ownership, because my concern
3 is while optional completeness answers the question,
4 again, we're still talking about ownership of the land.
5 And that is not an issue because the Court has ruled
6 legally.

7 MR. WOTRING: So with respect to the answer
8 on Page 18 --

9 THE COURT: I think it would be -- I think
10 what you would do is something to the effect of:

11 "Okay. Mr. Dukert, let me ask you just
12 generally, one of the topics is Topic No. 6 is the
13 operation of the site. Does International Paper
14 understand who operated the site during the time it was
15 receiving waste from the Champion facility?"

16 "ANSWER: Yes."

17 Or you can say "Yes," and then you go down
18 to "Yes" --

19 MR. WOTRING: Can we go down to --

20 THE COURT: "Yes, they operated it and
21 controlled the site. That's International Paper's
22 understanding," or something like that.

23 MR. WOTRING: Can we go from -- can we go
24 from that question down to the answer starting on Line
25 9, Page 18?

1 THE COURT: "And just for clarity on this
2 diagram, my understanding was we're talking about a
3 site at the intersection of the interstate and the
4 San Jacinto River, and there were several waste pits
5 involved, and that's what this represents."

6 MR. WOTRING: This might be the question to
7 which -- I don't know, Your Honor, but it might be the
8 question to which -- we're still looking at the picture
9 on the screen.

10 THE COURT: Well, what's the map? I'm
11 referencing this map here, Page 47 in Exhibit 117.

12 MR. WOTRING: That is earlier on Page 16
13 that we just talked about.

14 THE COURT: That is the picture?

15 MR. WOTRING: That's the picture where I
16 introduce him to it. Now he's looking at a map.

17 THE COURT: Now he's looking at a map, not
18 the picture?

19 MR. WOTRING: The picture is that -- the
20 picture is the -- the TCEQ document that has got the
21 three pits on it, A, B, and C, that picture. I think
22 that's what he's looking at. In fact, I'm certain
23 that's what he is looking at, because that's Page 47 --

24 THE COURT: So let me hear from
25 Mr. Stanfield, if you have any objection to the question

1 and answer phrased this way.

2 The question starting on Page 17, Line 20:

3 "Okay. Mr. Dukert, let me ask you just
4 generally, one of the topics is Topic No. 6 is the
5 operation of the site. Does International Paper
6 understand who operated the site during the time it was
7 receiving waste from the Champion facility?

8 "ANSWER: Yes," on Line 1, Page 18.

9 Then we skip down to the question on Page
10 18, Line 5: "And again, just to reorient you, when I
11 talk about the site, I'm referencing this map here, Page
12 47 in Exhibit 117."

13 Answer starting at Line 9: "And just for
14 clarity on this diagram, my understanding was we're
15 talking about a site at the intersection of the
16 interstate and the San Jacinto River, and there were
17 several waste pits involved, and that's what this
18 represents."

19 And then the question is do we go down to
20 "So they operated it and controlled the site. That's
21 International Paper's understanding" or -- or it would
22 be something -- if you want the rest of it all the way
23 down to "It was taken over by McGinnis, or MIMC."

24 MS. HINTON: Your Honor, on behalf of MIMC,
25 I sort of like the first part of that paragraph talking

1 about previously owned and operated it.

2 THE COURT: So we can pick up at Page 18,
3 Line 14. It says, "In reviewing the contracts and other
4 documents for this deposition, the site was owned and
5 operated and engineered and built by Ole Peterson and
6 Burma, originally, as when J. L. Burns was president.
7 And after they ran into problems, it was taken over by
8 McGinnis, or MIMC, I believe. So they operated it and
9 controlled the site. That's International Paper's
10 understanding."

11 MR. STANFIELD: I certainly like all of
12 that. I don't like multiple waste pits, but --

13 THE COURT: I understand. I think that
14 allows you to use the answer and take out the ownership
15 part.

16 MR. WOTRING: Harris County is fine with
17 making those redactions.

18 THE COURT: Okay.

19 MR. WOTRING: I was thinking if the Court
20 wouldn't mind giving an instruction about redaction
21 because sometimes juries, at the end, report they don't
22 understand what was going on and they think that somehow
23 the attorneys were involved in redactions. And if the
24 Court would entertain an instruction that --

25 THE COURT: I would be happy to do that. I

1 think we referenced it about documents, but not
2 depositions.

3 MR. WOTRING: Yes.

4 THE COURT: And so I will be happy to, in
5 front of the jury say, "Ladies and gentlemen, all
6 counsel who are presenting depositions have had to edit
7 things to comply with the Court's rulings, previous
8 rulings."

9 MR. STANFIELD: Your Honor, the next
10 objection I have is on Page 34, Line 22, going through
11 35, Line 9. To be fair, the County does not have
12 Mr. Carter's objection in there. I'm just talking
13 about -- this is a legal conclusion, and it's irrelevant
14 in light of the Court's rulings about the contract.

15 I have not objected to the other testimony
16 about the contract, which I don't really think it's
17 completely relevant, but I guess it's fine for some
18 background. But here, he's asked for a legal conclusion
19 as to the scope of work, but given the ruling about when
20 the contract expired and that it can't give rise to our
21 control during the penalty period, it doesn't need to
22 come in. We had a big debate about this during the
23 summary judgment hearing, you may remember, when the
24 penalty period was different.

25 THE COURT: Mr. Wotring.

1 MR. WOTRING: This is -- the scope of work
2 is the -- generally, the Champion standard terms and
3 conditions; and this excerpt, the corporate
4 representative is saying that the work they were doing,
5 the work MIMC and Ole Peterson were doing, were covered
6 by the scope of work at the back -- at the back of the
7 contract.

8 MR. STANFIELD: Well, the dispute was
9 different because Exhibit A are the safety procedures
10 for the Champion mill. And as you recall, we have a
11 difference of opinion, it's on the screen, of what the
12 scope of work entails, which our contention is that the
13 scope of work only entails the work at the mill to
14 remove it, and then just take it to a site.

15 And this really is irrelevant at this
16 point. It's also a legal conclusion as to what that
17 would mean. I don't see why we need to somehow tie in
18 the safety procedures being followed at the mill and how
19 that fits into the case.

20 MR. WOTRING: This goes to their control.
21 I think this contract goes to 1971. So that is after
22 the law changed.

23 THE COURT: But weren't these things about
24 safety at the mill, meaning people coming onto the mill
25 premises and that they need to make sure that people are

1 following particular procedures so nobody gets hurt or
2 injured when they're on the mill premises?

3 MR. WOTRING: Not according to the
4 corporate representative.

5 MR. STANFIELD: Well -- so if we look on
6 the first page, "Scope of Work" in Paragraph 1, what
7 you'll see is that the scope of work just covers removal
8 by contractor of pulp and paper mill waste sludge
9 material from Champion's waste basins located generally
10 to the west of its main plant facilities in Pasadena,
11 Texas; and it goes on from there.

12 The scope of work does not even reach into
13 what happens at the disposal site. It just says:

14 This is your scope of work. You come onto
15 our facility and you take it away.

16 THE COURT: All right.

17 MR. STANFIELD: The only thing it says
18 about this site is that "The Contractor has agreed with
19 Champion to furnish all labor, supervision, materials
20 and equipment necessary to perform such work," such work
21 which is at the mill site, and to procure at their own
22 expense "a tract of land acceptable to Champion to be
23 used by Contractor for depositing such sludge and to
24 transport such sludge..."

25 The scope of work is not all encompassing,

1 and Exhibit A does not go to the site. Of course, that
2 is a legal determination for the Court, as to what the
3 meaning of this would be.

4 MR. WOTRING: Well, it would go to
5 Champion's understanding of its contractual rights and
6 ability to exercise the control contained in Exhibit A
7 to the scope of work under the contract, which is
8 Paragraph 1 of Exhibit No. 64.

9 MR. CARTER: Judge, this has not been
10 part -- this is no longer -- and this was part of the
11 summary judgment rulings that you made. This issue
12 is -- it no longer goes to any issue that the jury will
13 have to determine. And so the contract, as we've said,
14 whether it's '66 termination or '71 termination is
15 irrelevant.

16 THE COURT: Their point is that you cannot
17 use this to extend their duty beyond the life of the
18 contract, whether it ends in '66 or it ends in '71.

19 MR. WOTRING: If it ends in '71, that's
20 after the general prohibition went into effect. And we
21 should be able to say after the prohibition went into
22 effect, they had the contractual right to -- to exercise
23 the control contained in the contract with MIMC and
24 contained in Exhibit A.

25 MR. CARTER: That's a pretty significant

1 extension, because then you need to determine when the
2 contract ended, and that needs to be done because the
3 terms of the contract -- that's also a legal issue. And
4 for now, even if it ends in '71, he wants to reach back
5 outside the penalty period and try to put some
6 obligation on us. That's not been an issue in this
7 case. It's not pled. It's not part of this lawsuit.

8 '73 is the penalty period. That's what
9 we've been dealing with.

10 MR. WOTRING: Certainly, it's part of the
11 lawsuit.

12 THE COURT: I understand, but their point
13 is whether it ends in '66 or '71, this would -- the way
14 you're arguing it, is going to extend beyond the penalty
15 period.

16 MR. WOTRING: Backwards.

17 THE COURT: Backwards.

18 MR. WOTRING: Beyond the penalty period
19 and --

20 THE COURT: Impose a continuing obligation
21 on them, as opposed to during the time of the contract.

22 MR. WOTRING: This is during the time of
23 the contract.

24 THE COURT: Right. But their point is that
25 now that the penalty period starts in '73, it's not

1 relevant for purposes of liability as to them, vis-à-vis
2 MIMC. They've got their own exposure as IP under the
3 statutes; but for MIMC's activities, those ended at the
4 latest '71, per the Court's previous ruling, is their
5 point.

6 MR. WOTRING: And the response is we
7 should be able to show that as late as 1971, Champion
8 had the -- had the rights under the contract that
9 contained the rights established in the contract,
10 itself, and in Exhibit A to that contract pursuant to
11 the excerpt here that runs from Page 34 through Line 9
12 on Page 35.

13 THE COURT: Why is that relevant?

14 MR. WOTRING: Because after the Water Code
15 came into effect, they still had the right, under the
16 contract, to apply the provisions of Exhibit A to MIMC.

17 THE COURT: But there is nothing in the
18 trial that shows a violation of the Water Code during
19 the life of the contract.

20 MR. WOTRING: Well, it would show that they
21 could have taken actions to stop future violations.

22 THE COURT: I'm going to sustain that
23 objection.

24 MR. CARTER: Thank you, Your Honor.

25 MR. STANFIELD: Not for the record.

1 (Whereupon, after a discussion off the
2 record, the following proceedings were had:)

3 THE COURT: Now we're going to go back to
4 what page we're on.

5 MR. STANFIELD: All right, Your Honor. We
6 move to page -- did you take your note on that one?

7 THE COURT: I did not.

8 MR. STANFIELD: It was Page 34, Lines 22
9 through 25 and Page 35, Lines 1 through 6 and Line 9.

10 THE COURT: Got it. Okay.

11 MR. STANFIELD: Page 37, my copy of this
12 shows the County cut now beginning on Line 8 --

13 THE COURT: With "did."

14 MR. STANFIELD: -- "did," running
15 through -- taking out the objection and running through
16 Page 38, Line 10.

17 THE COURT: Yes.

18 MR. STANFIELD: This is not relevant, the
19 due diligence that we did or did not do with Ole
20 Peterson or, frankly, with MIMC. It's not part of the
21 case.

22 The jury was told in opening statement by
23 the County that this case is not about whether or not
24 the waste should have been put in the pit. That
25 necessarily indicates this case is not about whether we

1 did proper due diligence as to whether MIMC or Ole
2 Peterson could properly carry out the contract, which as
3 we just discussed, ended at the latest in 1971.

4 MR. WOTRING: I thought Mr. Carter said in
5 opening they did due diligence, the companies that they
6 hired in their contract.

7 MR. CARTER: If I did, it was because it
8 didn't register to me that you had given up that issue.
9 That was part of the script at the time.

10 THE COURT: The objection is overruled.
11 Off the record.

12 (Whereupon, after a discussion off the
13 record, the following proceedings were had:)

14 MR. STANFIELD: Starting on Page 49, Line
15 16, through 50, Line 24, this is irrelevant and calls
16 for speculation. Let me cut to this -- and, of course,
17 the objections need to come out on Lines 9 and 16 at
18 Page 50. But on Line 17 of Page 50, where this
19 culminates, Mr. Dukert states, "It would call for a
20 great deal of speculation on my part."

21 THE COURT: And then there is an objection
22 lodged.

23 MR. STANFIELD: Correct. So that
24 speculative answer and the discussion about the stock
25 needs to come out for that reason.

1 In addition, this is before the penalty
2 period, because it kicks off on Line 16 at Page 49 about
3 the period of 1964 and engineering studies of offsite
4 sludge disposal from the Pasadena plant.

5 Again, this is not part of the case for the
6 reasons I just explained about the other cut, because
7 our selection of offsite disposal at this site is not an
8 issue in the case. That's what the jury has been told.

9 MR. WOTRING: We'll take that cut out.
10 That's 49, Line 16 through 50, Line 24.

11 MR. STANFIELD: Correct.

12 All right, Your Honor. Page 51, Line 22,
13 through 53, Line 6. Again, this is talking about an
14 internal memorandum dated September 12th, 1964, from
15 people within the Champion organization. Essentially,
16 there is some background information about who these
17 people are, but then where it culminates -- so that's
18 really not relevant, but where it culminates also leads
19 into a 403 problem on Page 53 where they talk about
20 ocean dumping.

21 Well, I would contend that ocean dumping
22 could be prejudicial and, of course, it was not
23 selected; and the disposal method chosen, again, is not
24 relevant to this suit.

25 MR. CARTER: And that came up during --

1 THE COURT: There was an issue about -- it
2 was Dr. Pardue.

3 MR. CARTER: Right.

4 THE COURT: There was some discussion of
5 that.

6 MR. CARTER: Right.

7 MR. STANFIELD: 110 miles offshore and 400
8 fathoms deep. It also came up during Bill Stewart's
9 deposition, which is going to be withdrawn, but he
10 testified as county rep, stating that that is what we
11 should have done.

12 MR. WOTRING: He was a county
13 representative on something else, which has not been --
14 I handed a copy to the Court of Exhibit No. 210. What
15 this would show is that Champion understood the nature
16 of the waste, and that if it was going to have to
17 dispose of it, itself, at the ocean, it would have to do
18 so out in the ocean.

19 MR. STANFIELD: I have a lot of ocean
20 dumping objections throughout here, Your Honor; and it
21 should not be part of this case.

22 THE COURT: Why isn't the only thing that's
23 relevant, if it is at all, is: "My interest in this
24 matter is due to the fact that we have a potentially
25 serious problem of sludge removal from the Texas

1 basins"?

2 MR. WOTRING: I can limit the proffer for
3 Exhibit 210 to that issue.

4 THE COURT: Because your point is that they
5 understand that they -- it's an issue.

6 MR. WOTRING: Right.

7 MR. STANFIELD: But, Your Honor, that is
8 not really relevant either. The lead-up of all of this,
9 and this is how the case was discovered and litigated
10 and it's not part of the case any more, was that
11 Champion was basically running out of time, and then we
12 hired a bunch of yahoos to get rid of this waste. But
13 that's -- you know, and that's why this awful solution
14 was chosen.

15 But now, again, this lawsuit is not about
16 our decision to put it in a landfill at this particular
17 location with this particular design. That's out.

18 THE COURT: So I guess the question becomes
19 since it has been acknowledged in this trial by all
20 parties that this case is not about the original
21 disposal of the waste in the impoundment, and that no
22 one is critical of that, then what is the relevance of a
23 problem of sludge removal?

24 MR. WOTRING: Well, it is that the
25 defendants keep going back to that initial period of

1 time to show that they acted as reasonable companies and
2 did appropriate due diligence, who handled everything
3 appropriately and, therefore, it's somehow unfair to go
4 back and try to seek penalties from them. So it's a
5 response to that first argument that they made, the
6 reasonable, the due diligence, "did everything we were
7 supposed to do."

8 THE COURT: Okay. I'll let the other
9 portion in because I agree with you that was referenced
10 in opening and I think the other portion of the depo
11 directly responded to that.

12 This, I think, is a little different issue.
13 I'm going to sustain the objection.

14 MR. WOTRING: That runs from 51/22 through
15 53/6.

16 MR. STANFIELD: That's going to continue on
17 for 53/14 through 54/11, because it's talking about the
18 same document and having, quote, "A potentially serious
19 problem of sludge removal," ending at Line 16 on Page
20 53. Of course, the witness went on to state at Lines 19
21 through 20 that he would have to speculate as to what
22 that would mean, "a potentially serious problem."

23 MR. WOTRING: I think the Court's objection
24 would go from 54, Line 14, through 22, and up to 55,
25 Line 5.

1 THE COURT: I think that's right. Okay.
2 So that's for the issue of relevance and speculation.

3 MR. WOTRING: That's correct. I have some
4 other cuts, Your Honor, as we're going along.

5 THE COURT: Okay. Why don't you tell us
6 what your next objection is and if that's one he's
7 removed, he can reference it.

8 MR. STANFIELD: He has removed some of it,
9 but I do have an objection to this section. It's going
10 to be broader than this. Let me just deal with it in a
11 larger way, which I think we can then apply throughout.

12 One of the exhibits used was -- it's noted
13 here as Exhibit 211. We replaced it with Exhibit 211-A.
14 It was more legible. It is a very lengthy document in
15 which Champion solicited a lot of different proposals as
16 to how they could have the sludge removed. Lots of
17 options. A big memorandum was written. They had all
18 the proposals from all the parties and eventually one
19 was selected.

20 The copy you have does not look as large as
21 what I just indicated, but that's because I believe it
22 is double sided.

23 In any event, I don't think this exhibit is
24 relevant any more because this just goes to our thought
25 process as to how we chose the one option we did. That

1 was approved by the County.

2 And the way the questioning develops
3 throughout these cuts is, one of the things the memo
4 states is, "We're trying to find the best option from a
5 cost and community-relations perspective." And then
6 Mr. Wotring, through questioning that I might have done
7 myself, if I was on his side, said "Where do you see the
8 word 'safety' in here?" But that is not a -- that is a
9 compliment.

10 But that's not an issue in this case about,
11 well, what did you consider about safety," et cetera,
12 because that implies that, you know, from the get-go our
13 selection of a landfill at this location and of this
14 design was not safe and was not appropriate. So I don't
15 think any references to this exhibit need to come in or
16 our decision process to hire these contractors.

17 THE COURT: So what issues, Mr. Wotring,
18 does this document go to that are still in the case?

19 MR. WOTRING: I still think it's responsive
20 to statements made previously about the reasonableness
21 of the company's actions, they did the right thing, did
22 the appropriate due diligence. No. 211-A that this line
23 of questioning goes through, you know, reflects the
24 fact, quite frankly, that what they were concerned about
25 was costs and costs alone; and even their statement that

1 they're thinking about --

2 THE COURT: They talk about cost in terms
3 of the contractor or are they talking about costs in
4 terms of the way they're disposing of it?

5 MR. WOTRING: Both, both. The cost in
6 terms of the contractor and that when they say that
7 they're looking at community relation aspects, they're
8 really not. They're similarly looking at costs. That's
9 this line of questioning.

10 THE COURT: Where is the part that
11 references the cost of the contractor?

12 MR. WOTRING: It's in each one of the
13 different options in 211-A.

14 THE COURT: Where does MIMC fit into that?

15 MR. WOTRING: MIMC is -- they have got
16 the -- Ole Peterson is one of the options. It is
17 option --

18 THE COURT: How does MIMC compare with Ole
19 Peterson?

20 MR. STANFIELD: Well, MIMC wasn't in
21 existence at this time.

22 THE COURT: Right. I mean, in terms of
23 costs.

24 MR. STANFIELD: Well, they took over the
25 contract.

1 THE COURT: So they got assigned the same
2 costs. That's what I thought.

3 MR. STANFIELD: And Ole Peterson fits in --
4 it was not the cheapest option. The cheapest option was
5 basically dump trucking over city streets.

6 THE COURT: So here's -- the reason I asked
7 those questions is because of this: While Mr. Carter
8 did address some of those things in opening, when he
9 talked about "We did the right thing," he wasn't talking
10 about -- he wasn't specifically talking about the due
11 diligence in picking MIMC. He was talking more
12 specifically about going to Dr. Quebedeaux and those
13 kind of issues.

14 He did reference some due diligence, which,
15 again, is why I let in that one part. And there wasn't
16 any question about Ole Peterson, so that's -- so if
17 there was a question about MIMC, that would be one thing
18 if they hadn't assigned the contract and it was actually
19 a different contract that was a lot cheaper than the one
20 they had with Ole Peterson, then this might be
21 interesting for that purpose in terms of, you know, "We
22 quickly replaced Ole Peterson with a fly-by-night
23 company that cost us a lot less," et cetera.

24 MR. WOTRING: Here is another issue, is
25 that Bob Zoch is their expert and he's going to testify,

1 as he did in his deposition, on the issue of the
2 reasonableness of the company primarily focused on the
3 '60s.

4 MR. CARTER: Well, we haven't gotten here
5 yet. It depends on how much of this stuff you want to
6 get in. He will turn around and address that issue; but
7 if that issue is off the table, he's not going to be
8 talking about it. He's focused like a laser beam.

9 MR. WOTRING: We may have to go off the
10 record for a little bit on that.

11 Well, he --

12 THE COURT: Here is the deal: My view
13 would be that, like I allowed you to in this deposition
14 on the due diligence before they hired MIMC, that's one
15 thing. The due diligence or the issue with regard to
16 how they decided about this disposal method, I think, is
17 not at issue in the case because no one has taken the
18 position that there was anything wrong with the disposal
19 method; and, in fact, all the witnesses have agreed to
20 it, the parties have stipulated to that, that that's not
21 what this case is about. The issue is about letting the
22 waste get out of the impoundments. So I would not think
23 Mr. Zoch would be relevant on those points, either,
24 because it's not an issue.

25 MR. CARTER: That's fine.

1 THE COURT: So I'm not inclined to let him
2 testify about that, if I'm not letting you go into the
3 issues of the methods of disposal.

4 MR. WOTRING: I understand the Court's
5 rulings. And when the Court says that we're stipulating
6 that the method of disposing the waste was appropriate,
7 it is along the lines of our argument previously --
8 Harris County's argument previously in this case as
9 spelled out in opening.

10 THE COURT: Yes, sir. Correct.

11 MR. WOTRING: I appreciate the Court's
12 clarifying that. So --

13 THE COURT: In other words, everybody has
14 been clear this case is not about the initial disposal
15 of the waste into the impoundment. It is about letting
16 it get out of the impoundment, adjacent to or into the
17 San Jacinto River.

18 MR. WOTRING: So with that guidance from
19 the Court, we would go from Page 59 through --

20 MR. STANFIELD: So you would start, "No,"
21 on Page 55, Line 7.

22 THE COURT: Yes, because it covers that
23 exhibit.

24 MR. STANFIELD: No. 211 and 211-A are
25 different.

1 MR. WOTRING: Yes. The 211 is the one --
2 we're going to go from Page 55, Line 7, all the way
3 through 56, Line 9, and then picking back up on Page 59,
4 Line 21, through certainly 61 -- well -- and if the
5 Court -- if I can refer the Court -- certainly Page 60
6 through --

7 THE COURT: You're looking at Line 24?

8 MR. WOTRING: Yes.

9 MR. STANFIELD: I would submit that all of
10 the cuts through Line 80 (sic) are out, based upon that,
11 because they are all about Exhibit 211 and 211-A. There
12 are cuts in there that I have not objected to from the
13 perspective of I think they do show due diligence, if
14 that were coming in.

15 THE COURT: You said Line 80. You mean
16 Page 80?

17 MR. STANFIELD: Page 80.

18 THE COURT: So you're objecting to Page 60,
19 Line 24, through Page 61, Line 7?

20 MR. STANFIELD: Your Honor, I'm objecting
21 to every -- based upon keeping 211 and 211-A out, I'm
22 objecting to every single cut through Page 80, Line 16,
23 beginning with Page 55, Line 7.

24 THE COURT: Because they're all referencing
25 that -- those documents?

1 MR. STANFIELD: That document.

2 THE COURT: Right. 211-A?

3 MR. STANFIELD: Correct. We don't pick up
4 with a new document until the next cut after Page 80,
5 which begins on Page 87, Line 23, which is Exhibit 211.

6 MR. WOTRING: Well, that -- the document
7 does talk -- run through those pages, but I'd say 60,
8 Line 24, through 61, Line 7 is focused on due diligence.

9 MR. STANFIELD: With Burma.

10 THE COURT: Well, the problem is -- I agree
11 with you, except look at the way the question is worded.
12 It says, "Do you see any other documents reflecting
13 Champion conducting any sort of due diligence with
14 regard to Burma Engineering Company prior to making the
15 recommendation, number one?"

16 That's what makes that problematic. I
17 think you have it covered in that other section.

18 MR. WOTRING: I understand.

19 MR. STANFIELD: And this, likewise, will
20 mean that I don't get cuts which, frankly, I think are
21 very helpful to me where he talks about the fact that we
22 did a trial run with Burma that was observed.

23 MR. WOTRING: No, no. I might want the
24 clip of the trial run with Burma. So --

25 MR. STANFIELD: Frankly, that also deals

1 with the southern impoundment which is not an issue that
2 concerns me as much as it does some other people in this
3 room.

4 THE COURT: So that takes us through Page
5 80.

6 MR. WOTRING: Let me check and make sure.

7 THE COURT: Okay. I'll let you look at
8 that.

9 (Pause in the proceedings)

10 THE COURT: Anything we need to look at
11 before we move on to the next objection?

12 MR. WOTRING: No, Your Honor.

13 THE COURT: Okay. Mr. Stanfield, your next
14 objection?

15 MR. STANFIELD: So starting on 87, Line 23,
16 Earnest has removed some of this; but we still have
17 Exhibit 212 and 214. I'm not sure what the relevance of
18 that is at this point. We pick up again on Page 93,
19 with Exhibit 212; and what that talks about is, starting
20 on Line 3, it's being quoted, "These studies indicated
21 that the least unattractive solution to the Texas sludge
22 problem is offsite disposal by barge." And then we kind
23 of go through there.

24 I just -- and it goes right along with
25 Exhibit 211-A. That was the major study done at that

1 time.

2 MR. WOTRING: This one, I think, would go
3 to why the company should have kept track of its sludge,
4 even into the '70s, '80s and '90s, because it understood
5 that it was the least attractive option and understood
6 there were extreme limitations with it.

7 THE COURT: Off the record.

8 (Whereupon, after a discussion off the
9 record, the following proceedings were had:)

10 THE COURT: Back on the record.

11 That is, I guess, 87, Lines 23 through 88,
12 Line 8, and then 93/2 through 94/11?

13 MR. STANFIELD: Yes, Your Honor.

14 MR. WOTRING: Those objections have been
15 sustained, Your Honor?

16 THE COURT: Yes.

17 MR. WOTRING: Thank you, Your Honor.

18 MR. STANFIELD: All right. To the next
19 one, Page 94, Line 21, through 95, Line 7. The
20 objection has been removed. I understand that this
21 document has come into evidence; but in terms of how
22 Mr. Dukert was able or not able to address it, frankly,
23 it makes it irrelevant and speculation.

24 As he states on Page 95, Lines 6 through 7,
25 he says --

1 MR. WOTRING: We can take that out. We're
2 looking at 94, Line 21 through 95, Line 7.

3 THE COURT: Yes.

4 MR. WOTRING: We can take that out.

5 THE COURT: Okay.

6 MR. STANFIELD: Now I feel like I should
7 have left it in. I feel like I have been snookered.

8 MR. WOTRING: Do you want to take a break?

9 MR. STANFIELD: Okay. So then we get on
10 Page 95, Line 20, which really should begin at Line 19
11 probably, through -- we get Page 98, Line 14. That is
12 talking about the 1955 memo, which I think has been
13 admitted in a redacted form for a limited purpose.

14 THE COURT: It has.

15 MR. STANFIELD: And so I think this
16 testimony now comes out. It also talks about ocean
17 dumping, which --

18 MR. CARTER: And that was also part of the
19 Pardue discussion, I think.

20 THE COURT: It was.

21 MR. STANFIELD: Yeah. But ocean dumping,
22 just for the record, I believe is a 403 problem.

23 THE COURT: I think that goes down to
24 97/15. I'll sustain that objection; but, again, if
25 there is an issue raised, and I think it would be

1 something I would be addressing long before closing, if
2 it is raised by any witnesses, then I'll revisit that.

3 MR. STANFIELD: So, then, objection
4 overruled for 97, Line 16, through 98, Line -- or where?

5 THE COURT: Well, that is just about the
6 volume. So I don't see that that is objectionable.

7 MR. WOTRING: And it has got some
8 information about the percentage of solids.

9 THE COURT: All right.

10 MR. STANFIELD: Well, just for purposes of
11 discussion, as I think you understand, we believe that
12 the paper-making process changed over time and,
13 therefore, 1955 data is not necessarily reflective or
14 helpful to the jury for 1965/'66 data.

15 THE COURT: What we agreed, as I recall,
16 from that document was that the witness said that the
17 moisture content was the same, right?

18 MR. WOTRING: That's correct, Your Honor.

19 THE COURT: So how does that fit with this
20 testimony?

21 MR. WOTRING: It's talking about 5 percent
22 solids. Five percent solids is a moisture content
23 reading.

24 THE COURT: So that's consistent?

25 MR. WOTRING: Correct, Your Honor.

1 MR. STANFIELD: From a science standpoint,
2 I can't disagree that solid content relates to moisture.

3 THE COURT: Objection overruled.

4 MR. WOTRING: Can I -- I need to have some
5 introduction for that document.

6 THE COURT: Let's see. Where do we -- how
7 about 95/19 through --

8 MR. STANFIELD: 22?

9 THE COURT: Well, he wants to stay what
10 it's called. Oh, I see. Didn't the -- did the titles
11 of that come in? I don't remember how we redacted it.

12 MR. WOTRING: Yes, the title did come in.

13 MR. STANFIELD: The only thing I think was
14 redacted --

15 THE COURT: Was the other part besides
16 moisture, right?

17 MR. STANFIELD: I think that's right, and
18 there may be something about black liquor.

19 THE COURT: There is; you're right. So I
20 think you could use 95, Line 20, through 96/1 and end
21 with "deposition." Don't ask "Does that ring a bell,"
22 because you are going to move on to the next question.
23 And then you'll go over to 97/16 and start with "If you
24 look at the top of that table." That puts it in context
25 and then you're okay all the way down to -- is it 98/14?

1 MR. WOTRING: Yes, Your Honor.

2 MR. STANFIELD: So then I move to Page 100,
3 Line 10 through 25, which is related, as well, to the
4 cut on page --

5 MR. WOTRING: I think the Court has
6 previously excluded our reference to their trucking
7 their sludge across city streets and the resulting
8 injunction activity against them.

9 THE COURT: I have.

10 MR. WOTRING: So I think pursuant to the
11 Court's earlier rulings, we'll take out Page 100, Line
12 10 --

13 MR. STANFIELD: I think that takes us
14 through the cuts on 104, as well. I think the cuts
15 on --

16 MR. WOTRING: Yes, that's correct.

17 MR. STANFIELD: -- 100, 101, 102, 103 and
18 104 are out, subject to the Court's prior ruling.

19 THE COURT: Okay.

20 MR. STANFIELD: Okay. On Pages 107 and
21 108, I just need to pull out the objections from
22 counsel.

23 MR. WOTRING: Yes.

24 THE COURT: We made that agreement that
25 those were going to come out in all depositions.

1 MR. WOTRING: I think we've been pretty
2 good about taking those out.

3 THE COURT: You have.

4 MR. STANFIELD: I think that that can all
5 come in. Okay. On Page -- so Page 109, I have got one
6 that's highlighted, as well, but I know you're going to
7 sort that out in terms of objections.

8 MR. WOTRING: Yes.

9 MR. STANFIELD: On Page 110, I think you
10 have to include the answer on Line 7 through 11 to the
11 prior question.

12 THE COURT: Yes. You stopped at the end of
13 the question.

14 MR. WOTRING: Yes, that would seem to be
15 the appropriate way to cut that excerpt. So we will
16 include 7 through 11.

17 THE COURT: We're going to include Page
18 110, Lines 7 through 11.

19 MR. STANFIELD: Page 115, optional
20 completeness, Lines 7 through 11 -- 7 through 11 of Page
21 115, as well.

22 THE COURT: Because it ends with "the" on
23 Line 6.

24 MR. WOTRING: We will add those, as well.

25 MR. STANFIELD: Again, I have a particular

1 affinity for that part of the answer, so I want to make
2 sure that's in there.

3 On Page 116, I think -- I think basically
4 Lines 9 through -- through 20 need to come out. It's
5 just an irrelevant discussion about Bates labels, is
6 what it turns into.

7 THE COURT: Are you talking about down to
8 Line 20?

9 MR. STANFIELD: Right. Page 116, Lines 19
10 through 20. I mean, it starts out with a question, but
11 then with some helpful insight from counsel it turns
12 into a discussion about Bates labelling.

13 THE COURT: But how do we deal with that
14 with Mr. Wotring asking on 21, "Would you agree with me
15 that the next line says" --

16 MR. STANFIELD: Well, I think that relates
17 up to the top on 115.

18 THE COURT: Gotcha, you're right.

19 MR. WOTRING: So we can take out Page 116,
20 Line 9 through --

21 THE COURT: 20.

22 MR. WOTRING: -- 20.

23 THE COURT: There you go. Okay.

24 MR. STANFIELD: So, you know -- hold on.
25 Let me just look at this. Okay.

1 So Page 117/23 through 118, Line 4, that's
2 speculation based upon the witness' own answer on Line 3
3 of Page 118.

4 THE COURT: So starting at 19 on Page 117,
5 or are you talking about Line 23?

6 MR. STANFIELD: Yes, Line 23.

7 THE COURT: So Line 23 on 117 through Line
8 5 -- 4 on 118.

9 MR. WOTRING: We'll take those out.

10 THE COURT: So we're taking out 117/23
11 through 118/4.

12 MR. STANFIELD: Page 120, Line 6 through
13 121, Line 12. Again, frankly, this is just to stay
14 consistent with what we have done. This is the trial
15 run, I believe, and kind of the initial contract phase
16 with Ole Peterson.

17 THE COURT: Mr. Wotring.

18 MR. WOTRING: Yeah, it is that document.
19 Are we -- what is counsel suggesting? We keep it in or
20 take it out?

21 MR. STANFIELD: Take it out.

22 THE COURT: To be consistent with the
23 other, take it out.

24 MR. WOTRING: I've lost the trail. What is
25 it consistent with? Earlier objections?

1 MR. STANFIELD: Right. So we took out the
2 other things about due diligence and what was done, and
3 this, to me, is part of that process, frankly, from our
4 end, to show that we do believe we did some due
5 diligence. But I think if that's coming out, this has
6 to come out, as well. But I --

7 MR. WOTRING: Well, this is relevant that
8 Champion played a role in this waste and in connection
9 to this waste because it was Champion's waste and it
10 wanted to know where it was going and who was taking it
11 there.

12 MR. STANFIELD: Well, but this references
13 Ole Peterson and Burma. I mean, that's the time of this
14 contract operation.

15 MR. WOTRING: And that would go from
16 whether it applied to Ole Peterson or applied to
17 McGinnis.

18 THE COURT: Do y'all really have an
19 objection to this coming in for IP.

20 MR. CARTER: We know where it was going. I
21 don't know that there was any --

22 MR. WOTRING: If one of the things that is
23 at issue, and we don't believe it's the only thing at
24 issue with respect to the violations of the different
25 environmental statutes, is whether Champion owned the

1 sludge, the fact that they're going along on a ride with
2 the people that are taking their sludge indicates their
3 care and concern over that sludge and where it was going
4 and how it would be kept.

5 MR. STANFIELD: To answer your question,
6 Your Honor, we do, because the effective dates of
7 disposal for this case are September 13th, 1965, through
8 May 10th, 1966, recognizing there is a dispute as to the
9 end date but not to the start date for the site at issue
10 in this case.

11 MR. WOTRING: Yes, but their ownership
12 interest in the sludge that they gave to either Ole
13 Peterson or they gave to MIMC would continue past any of
14 those dates; and this is a demonstration of at least
15 what they thought they needed to do with respect to
16 their sludge.

17 MR. STANFIELD: No similar evidence with
18 McGinnis that we were doing ride-alongs or any such
19 things. I don't agree that that would be any
20 indication, and if it were, you would have to have the
21 evidence for the McGinnis operation at the northern
22 impoundment.

23 THE COURT: Are you objecting to the next
24 section on 122? That's a question I have before I rule
25 on 120 and 121.

1 MR. STANFIELD: Yes, Your Honor, that would
2 have to come out for the same reason.

3 MR. WOTRING: The document says, "The
4 ability of the contractor to provide these requirements
5 is not clear at this time. However, he has the only
6 operation of this type locally and we are maintaining
7 close daily contact with him to assist him as we can in
8 an effort to stabilize the operation."

9 And we're entitled to introduce that to the
10 jury because this is a contract that's assigned over to
11 MIMC, and we're entitled to introduce that evidence to
12 show the reason they wanted to assist him is because
13 they knew they owned the sludge and they wanted to make
14 sure that their sludge was appropriately taken care of.

15 THE COURT: Okay. I guess my question to
16 you is: Why isn't the appropriate thing to do on that,
17 122, Line 15 through 122, Line 22, ending at the word
18 "site"? Then, unfortunately, I'm going to have to
19 break.

20 MR. STANFIELD: That's fine, as long as
21 that prior stays out on Page 121.

22 THE COURT: That's why I'm asking
23 Mr. Wotring.

24 MR. WOTRING: Because there's just no flesh
25 on the bone here. I appreciate that 122, the entry

1 there, does address the issue as well; but the entry on
2 No. 120 demonstrates this company's commitment to their
3 sludge, and simply limiting it to the entry on Page 122
4 does not.

5 MR. STANFIELD: The historical documents
6 don't actually bear that out. What happened was -- is
7 that they were watering down the sludge to try to get it
8 to move through the pumps, there was a lot of breakage
9 of pump shafts. So they were trying to stabilize that
10 operation. The contractor was purchasing barges and
11 having to construct a barge slip at the Champion mill.
12 There was an incredible amount of work that was
13 happening to standardize and streamline the operation as
14 a whole, dealing with equipment, with barge moorings,
15 m-o-o-r-i-n-g-s, at the Champion mill. This was much
16 broader than us being concerned about where our sludge
17 "went."

18 MR. CARTER: That would cause Mr. Zoch to
19 be a little less focused.

20 THE COURT: Let me ask this question: Do
21 we have a copy for me to look at of Exhibit No. 216?

22 MR. WOTRING: We do.

23 THE COURT: Let's go off the record for a
24 second.

25 (Whereupon, after a discussion off the

1 record, court was adjourned)

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1 THE STATE OF TEXAS
2 COUNTY OF HARRIS

3 I, Kimberly Kidd, Official Court Reporter
4 in and for the 295th District Court of Harris County,
5 State of Texas, do hereby certify that the above and
6 foregoing contains a true and correct daily copy
7 transcription of all portions of evidence and other
8 proceedings requested in writing by counsel for the
9 parties to be included in this volume of the Reporter's
10 Record, in the above-styled and numbered cause, all of
11 which occurred in open court or in chambers and were
12 reported by me.

13 I further certify that this Reporter's
14 Record of the proceedings truly and correctly reflects
15 the exhibits, if any, admitted, tendered in an offer of
16 proof or offered into evidence.

17 WITNESS my hand this the 23rd day of
18 October, 2014.

19
20
21 /s/ Kimberly Kidd
22 Kimberly Kidd, Texas CSR No. 2437
23 Expiration Date: 12/31/15
24 Official Court Reporter
25 295th District Court
Harris County, Texas
201 Caroline, 14th Floor
Houston, Texas 77002
(713) 368-6453

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